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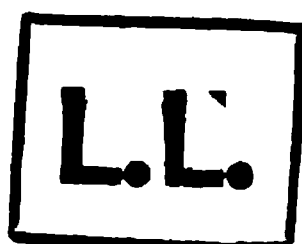
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ROBINSON & HARRISON'S DIGEST.

A
DIGEST OF REPORTS

OF ALL CASES DETERMINED

IN THE QUEEN'S BENCH AND PRACTICE COURTS

FOR UPPER CANADA,

FROM 1823 TO 1851 INCLUSIVE :

BEING

FROM THE COMMENCEMENT OF TAYLOR'S REPORTS TO THE END
OF VOL. VII. UPPER CANADA REPORTS.

[CAMERON'S DIGESTS INCLUDED.]

WITH

AN APPENDIX,

CONTAINING THE DIGESTS OF CASES REPORTED IN VOL. VIII.
UPPER CANADA REPORTS.

By ROBERT ALEXANDER HARRISON, STUDENT AT LAW ;

UNDER THE SUPERVISION OF

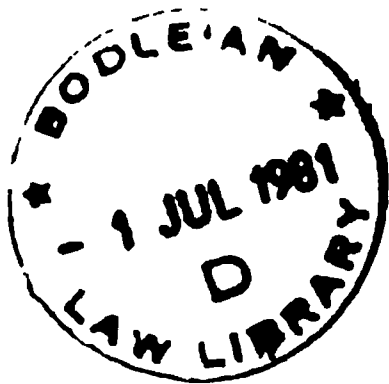
JAMES LUKIN ROBINSON, BARRISTER AT LAW,
REPORTER TO THE COURT OF QUEEN'S BENCH.

TORONTO:

HENRY ROWSELL, PUBLISHER.

1852.





*Entered according to Act of the Provincial Legislature, in the year of
our Lord one thousand eight hundred and fifty-two, by JAMES
LUKIN ROBINSON, in the Office of the Registrar of the Province
of Canada.*

TO
THE HONORABLE JOHN BEVERLEY ROBINSON,
CHIEF JUSTICE OF THE QUEEN'S BENCH;
AND
THE HONORABLE JAMES BUCHANAN MACAULAY,
CHIEF JUSTICE OF THE COMMON PLEAS;
THIS WORK
IS,
BY PERMISSION,
MOST RESPECTFULLY
INSCRIBED.

PREFACE.

UP to the year 1850, when the Court of Common Pleas was constituted under the statute 12 Vic., ch. 63, the King's Bench was the only common law court of superior jurisdiction in Upper Canada. From the time that this Court was established, in 1794, no reports of its decisions were published until the year 1828, when Mr. TAYLOR, who had been appointed Reporter to the King's Bench under a statute of the Province passed in 1823 (4 Geo. IV. ch. 3), published a volume of printed reports, commencing with Trinity Term 1823, and ending with Trinity Term 1827, during which period the late CHIEF JUSTICE POWELL and SIR WILLIAM CAMPBELL were successively at the head of the Court.

The profession however was so limited in the number of its members that there was too little encouragement to continue printing the reports, and it was abandoned until Michaelmas Term 1829, when Mr. DRAPER, now one of the Judges of the Queen's Bench, being at that time Reporter, resumed the publication, commencing with the period when the present CHIEF JUSTICE and Mr. JUSTICE MACAULAY, now Chief Justice of the Common Pleas, became members of the Court. A volume printed under the superintendence of Mr. DRAPER in 1831 contained reports of the decisions, beginning with Michaelmas Term 1829 and ending with Easter term 1831; but it was not carried on by his successor, no adequate provision having been made to meet the expense, until the year 1840, when the statute 3 Vic. ch. 2 was passed for that purpose. In 1845 Mr. CAMERON, who was then the Reporter, commenced the regular publication of the Reports of the Queen's Bench from Easter Term 1843 inclusive downwards, and this has been continued in an unbroken series by Mr. ROBINSON, the present Reporter, whose publication commenced with the third volume of the new series, and has now reached the ninth volume, bringing up the cases to Trinity Term 1851. The reports for each year about fill an octavo volume of 600 pages.

The present Reporter has also resumed the publication of the reports for the intermediate period between Mr. DRAPER's book and Mr. CAMERON's first volume, in a series of volumes intituled "Old Series," which is printed in quarterly numbers. This, when completed, will fill up the space between Easter 1831 and Easter 1843; they now reach to Trinity 1836.

Thirteen volumes in all have been published of the Reports of the Queen's Bench in Upper Canada.

Mr. CAMERON published in 1840 Digests of Cases from Michaelmas Term 10 Geo. IV. (1828) to the end of the year 1843.

Since that time, which covers an interval of nearly nine years, the decisions of the Court can only be found by searching through the index at the end of each volume, which has become at length a tedious task.

It appeared to the compiler of the Digest now offered to the profession and the public, that he would be rendering a valuable service by collecting in one volume a Digest of all the cases that have been printed, beginning with Mr. TAYLOR's volume and including all those of the Old Series which are yet to be published.

And he has endeavored to increase the convenience by a minute and accurate classification of the different subjects, which he trusts will enable all who are conversant with legal proceedings to turn readily to whatever the thirteen volumes of reports contain.

The profession will see that there has been at least no sparing of labor, and it is hoped that they will find that it has been carefully and judiciously applied. Such an attempt in the present stage of progress of this country holds forth little prospect of gain to the person making it, and indeed is not wholly free from risk. To make the undertaking in any degree remunerative, it will require to be very generally patronized by the profession, since it is almost exclusively among its members that such a work can be expected to circulate. Yet it is hoped that it will be found useful to others; and that, among the many who are interested in the operations and proceedings of municipal bodies, banks, insurance companies, and other joint-stock associations, there will be some who, though they are not lawyers, will think it desirable to have at hand the means of referring to whatever has been decided in the Queen's Bench on these subjects of great public interest. And it seems not unreasonable to expect that the members of the legal profession in some of the other British Colonies will desire to furnish themselves with a Digest which will conveniently direct them to decisions in Upper Canada made through a long series of years, upon questions which a similarity of circumstances must be frequently giving rise to in each of the Colonies.

It is now necessary to make a few explanatory remarks on the manner of executing the work. A single case frequently embraces several important points, requiring to be placed under distinct titles. This has been done to as great an extent as seemed practicable. Whenever the statement of facts was not too long, it has been placed under each particular title. But when this would have led to tedious prolixity, the compiler has placed the case under the most important title, and made a reference to it from each of the other titles.

Again, in searching for a case or a decided point, all persons will not look for it under the same title. Taking, for example, the case of costs in actions brought on judgments recovered in another Court, some, in looking for the decisions upon this branch of our law, would look to the title "Costs," whilst others probably would expect to find them under the title "Judgment." In every such case the title most likely to occur to the mind of the practitioner has been the one chosen, if proper in other respects. In the case above supposed, "Costs" has been the title chosen in preference to "Judgments."

But although this rule of adopting the title most likely to be referred to has been carried out, the other titles likely to occur to the mind have not been altogether omitted or left unnoticed; they have been inserted whenever thought of, and a reference made from them to the title where the case sought for will be found. This will sufficiently account for the numerous references made in different parts of the work.

Another rule observed, was always to place a case under its peculiar title rather than under the general class to which it belongs. Thus, cases of judgment as in case of nonsuit, similiter, and other matters of practice, have been respectively placed under the titles "Judgment as in case of Nonsuit," "Similiter," &c., and not under the general title "Practice." This rule has served to keep the title "Practice" from extending to an unreasonable and perplexing length. In one case only this plan was found to be almost impracticable; it was the compiler's intention instead of indiscriminately placing all cases of writs under the title "Process" to make the several kinds of writs distinct titles of their own, and this scheme has been partly carried out in "Capias ad Respondendum," "Capias ad Satisfaciendum," "Distringas," &c.; but when, during the progress of the work, the compiler came to the title "Summons" an unexpected difficulty appeared. It will be recollected that the original non-bailable process, now a writ of summons, was until very lately a non-bailable ca. re.; so that all cases of non-bailable process, including the non-bailable ca. re., could not with propriety be placed under the title "Summons." To obviate this difficulty to some extent, all cases of bailable ca. re. will, as heretofore, be found under the title "Capias ad Respondendum," and cases of non-bailable ca. re. and summonses under the title "Process," meaning original non-bailable process. But for this difficulty the title "Process" would not have been used at all. On somewhat the same principle it will be seen that the titles "Execution," "Fieri Facias," and "Capias ad Satisfaciendum," have found their places in the work. The distinction between them is this—under "Execution" will be found only general matters relative to issuing executions, and making seizures under them, some of which apply as much to one species of execution as to another; but under the titles "Fieri Facias" and "Capias ad Satisfaciendum" will be found such cases as peculiarly belong to those titles and no other.

All cases decided whilst the Bankruptcy Laws were in force have been inserted in full, not only because those laws have for certain purposes been revived, but because the cases are few in number; and it is probable that at no distant period we may have some system of Bankruptcy Law restored. Two or three cases decided under the Old Court of Request's Act, have been placed under the title "Division Court," from the similarity to the practice under the present Division Court Act. There may be a few other cases which can no longer be relied upon as directly applicable under the present system, from the fact of the laws on the particular points affected by them having been altered by recent legislation; but the compiler, as far as his knowledge enabled him, has noticed those cases and the statutes affecting them.

Some of the statutes of last session of Parliament have not been thus noticed, having been passed and become law after this work was written and arranged for the press. There are indeed but few cases which have been intentionally omitted on the ground of their not being law at present, and a skilful practitioner will readily discover them. The most obvious example of this occurs with reference to the title "Ejectment," which, from the enactments of the late statute 14 & 15 Vic. ch. 114, would seem to be of little or no use; but it must be borne in mind that the working of that Act is not yet settled—it will require decisions of the Courts to establish it and make the practice secure. Besides, the writ under the new act must be served in the same manner as the declaration under the old law, and here therefore the cases decided under the old law will be found available and indispensably necessary.

Among the suggestions given to the compiler by his friends, one particularly pressed upon him was the importance of having our statutory decisions so classified that at a glance the information sought could be speedily obtained. The reasons urged were, that up to 1792 we can find the English law in English books, but that since that period we must look to our own statute books, and to the construction given to the different imperial and provincial statutes by our own courts. To supply this want, there will be found in the following pages a Chronological Table of such statutes, both imperial and provincial, as have from time to time come before our Court of Queen's Bench for judicial construction; at least all the cases that could be collected from the reports and digests now printed. For an explanation of this table, the reader is referred to the note heading the same on page 408.

From a careful examination of the cases contained in the work with the reports from which they were taken, it would seem that in arranging the cases under the different titles a few have been inadvertently omitted; but, in order that they might not be altogether lost sight of, the compiler has briefly referred to them on page 535.

Since the completion of this Digest in November 1851 it has been in the hands of the printer, and owing to delays occasioned in procuring type, paper and other necessary materials, besides the ordinary delays of printing, nine months have elapsed, during which time the eighth volume of the *Upper Canada Reports* has been issued. And the compiler, feeling that it would be of service to the profession if the digests of the cases it contains were embodied in this work, has added it in an Appendix, nearly as it appears in the volume from which it was taken, thus completing the Digest of Queen's Bench cases down to the latest period.

Toronto, *August 3, 1852.*

EXPLANATION OF ABBREVIATIONS.

Tay. U. C. R.....	Taylor's Upper Canada Reports.
Dra. Rep.....	Draper's Reports.
O. S.....	King's Bench Reports, Old Series.
U. C. R.....	The Upper Canada Reports.
(Ap.).....	Appendix.

. Cases followed by the name of a Law Term refer to the Manuscript Reports of that Term in the Library of the Law Society.

In the references at the head of each title the Roman numerals, as IX., denote the larger divisions of titles; the English figures enclosed in parentheses, as (9), denote the subdivisions; and the English figures without parentheses, the numbers of the cases.



DIGEST OF REPORTS

FROM THE COMMENCEMENT OF TAYLOR'S REPORTS, TO THE END OF THE SEVENTH VOLUME OF ROBINSON'S REPORTS.

ABANDONMENT OF SEIZURE.

See EXECUTION, 19.—SHERIFF'S SALE, 6.

ABATEMENT.

See DOWER, II. 10.—INTERLOCUTORY JUDGMENT, 4.—NEW TRIAL, II. 19.—PAYMENT INTO COURT, 2.—PRACTICE, I. 2.

Plea — Non-joinder—Replication—Duplicity therein.—1. In a plea of non-joinder by a defendant in abatement, it is sufficient to state that the parties not joined are living within the jurisdiction of the court at the time of plea pleaded, and a replication to such a plea for the non-joinder of two persons is not double for assigning a different cause for not joining each of the two. *Yuille v. Harvey*, ii. O. S. 215.

Plea—In abatement of Privilege as an Attorney—Replication.—2. Where to a plea in abatement of privilege as an Attorney the plaintiff replied process issued against him and others, under 5 Wm. IV. ch. 1, (restraining several actions on bills, notes, &c.,) and that the others could not be served &c., and the defendant demurred—the court overruled the demurrer. *Richmond et al. v. Campbell*, Mich. Term, 2 Vic.

Plea—Non-joinder—Place of Residence.—3. If a plea in abatement of the non-joinder of a defendant do not state his place of residence, it is a nul-

lity. *Brewster v. Davy*, Hil. Term, 2 Vic.

[Statement of place of business is insufficient. *Maybury v. Moodie*, 12 Jur. 80.]

Plea—Non-joinder—Initial Letters.—4. A plea of non-joinder in abatement is bad on demurrer, if it state only the initial letters of the christian names of the party not joined. *Hastings v. Champion et al.*, Mich. Term, 3 Vic.

Feme Sole—Marriage after rule nisi obtained for Judgment as in case of nonsuit—Costs—Coverture puis darrein continuance.—5. Where a feme sole plaintiff had married after rule nisi obtained for judgment as in case of a nonsuit, which was afterwards made absolute, and she applied to set it aside, her rule was granted on payment of costs, and leave was given to the defendant to plead the coverture puis darrein continuance without affidavit. *Warren v. Kirby*, Mich. Term, 3 Vic.

Plea—Non-joinder—Third contracting Party not named.—6. A plea of non-joinder in abatement of a co-defendant fails where there is a third contracting party not named, although such third party be out of the province. The plea in such a case should shew all the parties liable, and then state that one is out of the province. *McKnight v. Scott*, Mich. Term, 3 Vic.

Action against a Sheriff—Plea—Auter Action.—7. In an action

against a sheriff and his sureties on their covenant, under 3 Wm. IV. ch. 8, it is a good plea in abatement that another action for the same cause is pending against the sheriff alone. *Commercial Bank v. Jarvis et al.*, Hil. Term, 5 Vic.

Plea—Non-joinder.]—8. A. sues B. alone in assumpsit; B. pleads in abatement that he made the promises jointly with C. & D.; that C. is resident within the jurisdiction of the court, and D. without:—*Held*, on demurrer to plea in stating D. to be residing out of the jurisdiction of the court, that the plea was good. *Corbett v. Calvin*, iv. U. C. R. 123.

9. On a joint contract by three, all must be sued, if within the jurisdiction of the court. If one is without the jurisdiction, the other two must be sued. One alone cannot be sued if there are two remaining within the jurisdiction, because all three cannot be sued. *Ib.*

ABSCONDING DEBTOR.

See ATTORNEY, II(3), 6.—BILLS OF EXCHANGE ETC., V. 2.—COSTS, IV (2), 1.—FALSE RETURN, 7.

Attachments refused—Affidavits.]

—1. An attachment was refused under the Absconding Debtor's Act, 2 Wm. IV. ch. 5, where only one person besides the creditor swore to the debtor's absconding or concealment; and per Curiam, the safest rules in framing affidavits under this statute will be to follow as nearly as possible those relating to the common affidavits of debt. *Anonymous*, ii. O. S. 292.

Affidavits.]—2. Where the persons swearing to the departure or concealment of a debtor reside at a distance from his place of abode, they should state in their affidavits the grounds of their belief. *Bank of Upper Canada v. Spafford*, ii. O. S. 373.

Attachment may issue pendente lite.]—3. An attachment against an ab-

sconding debtor may issue pendente lite, and where a defendant was arrested and gave bail, who were afterwards discharged by a reference to arbitration, and he then left the province, the court refused to set aside an attachment which had been issued against him as an absconding debtor. (Macaulay, J. dissentiente on this last point.) *Mosier v. McCan*, iii. O. S. 77.

Proceedings against, set aside.]—4. Where a plaintiff proceeded after a delay of more than a year from the issuing of his attachments, the proceedings were set aside and writs of supersedeas ordered to the attachments. *Bank of Upper Canada v. Spafford*, iii. O. S. 78.

When entitled to a Supersedeas to an Attachment.]—5. An absconding debtor who having returned to the province, gives the bond required by the Act, and puts in special bail, may have a supersedeas to the attachment. *Clark et al. v. Mallery*, iii. O. S. 157.

When mesne process may issue.]—6. Mesne process cannot issue under the Absconding Debtor's Act, until three months have elapsed from the first advertisement under the attachment. *Banker v. Griffin*, iii. O. S. 163.

Attachment set aside, Affidavit being insufficient—Motion.]—7. An attachment was set aside, the affidavit of the creditor being for money lent and not stating by whom, and a certified copy of an affidavit filed in the office of the clerk of the Crown is sufficient to move upon. *McKenzie v. Bussell*, iii. O. S. 343.

When Property of a Person usually residing in the United States may be attached.]—8. The property of a person who usually resides in the United States, but who engages in an undertaking in this country, employs persons here and comes frequently to superintend their work, may be attached under the Absconding Debtor's Act. *Ford v. Lusher*, iii. O. S. 428.

Sureties.]—9. The sureties required by the plaintiff under the Absconding Debtor's Act, must be inhabitants of this Province. *Bradbury v. Lowry*, Hil. Term, 4 Wm. IV.

Cognovit given to defeat claims of Creditors.]—10. Where a debtor, who absconded from this province, before his departure gave his cognovit for 700*l.* to a person to whom he was not indebted, on which judgment was entered, execution issued, and some money made by the sheriff and some paid to the plaintiff's attorney, the court, on the affidavits and application of several bona fide creditors of the absconding debtor, ordered the attorney to pay to the sheriff the money he had received, and the sheriff to divide all the money between the creditors who had executions in his hands, ratably, according to their several claims. *Bergin v. Pindar*, iii. O. S. 574.

Motion to set aside Attachment and subsequent proceedings—Rule refused.]—11. Where a defendant moved to set aside an attachment and subsequent proceedings under the Absconding Debtor's Act several months after the last proceeding was had, on the ground that the plaintiffs were not inhabitants of the province, but filed no affidavit shewing that he was not indebted to any inhabitant of the province, the court refused the rule and left him to his action. *Fisher et al. v. Beach*, iv. O. S. 118.

[See statute 5 Wm. IV. ch. 5, sec. 2.]

Bonds—Penalty.]—12. The bonds required to be given by an absconding debtor to obtain a supersedeas to the attachment against him, must be in double the amount of the debt sworn to. *Heather v. Wallace*, iv. O. S. 131.

Proof of Debt to support Attachment.]—13. *Quere*: When an attaching creditor becomes himself the purchaser at sheriff's sale, and sues for

trespass to the property purchased, should he prove a debt to support his attachment? *Hayden v Crawford*, iii. O. S. 583.

Time to proceed against.]—14. A plaintiff cannot take a step in a cause founded on the attachment law until the three months allowed for the defendant to put in bail have expired. *Bunker v. Griffin*, iii. O. S. 163.

When absconding Debtor entitled to a New Trial.]—15. An absconding debtor returning to the province after trial and before judgment, is entitled to a new trial under the statute. *Robertson et al. v. Buck*, Hil. Term, 6 Wm. IV.

Attaching Creditor—Priority.]—16. Under the Absconding Debtor's Act, a first attaching creditor was entitled to priority over a subsequent attaching creditor who obtained execution first. *Gamble et al. v. Jarvis*, Trinity Term, 6 and 7 Wm. IV.

[See statute 5 Wm. IV. ch. 5, sec. 6.]

Attachment not granted for unliquidated damages.]—17. An attachment will not be granted against an absconding debtor for unliquidated damages. *Clark v. Ashfield*, Easter Term, 7 Wm. IV.

After Attachment, a Rule will be granted against any Party who has Property of the Debtor]—18. After an attachment has been issued against an absconding debtor a rule will be granted against any party who has property of the debtor in his possession, to deliver it up to the sheriff to whom the attachment is directed. *Mullens v. Armstrong*, Mich. Term, 2 Vic.

Affidavit of justification by whom made.]—19. The affidavit of justification by the sureties, required under the Absconding Debtor's Act before execution, must be made by the sureties themselves. *Mowat v. Forshee*, Easter Term, 2 Vic.

Affidavit of Debtor's having absconded.]—20. In the affidavit of two

creditable witnesses required before attachment against an absconding debtor, it is sufficient to state their belief that the debtor "has left the province, or is concealed within the same." *Totten v. Fletcher*, Trinity Term, 2 & 3 Vic.

Real estate—Duty of Sheriff.]—21. When the real estate of an absconding debtor is attached, the sheriff must enter and keep possession, to give operation to the attachment against strangers. *Doe dem. Crew v. Clarke*, Mich. Term, 4 Vic.

If a Defendant seek to set aside an Attachment on the ground that he does not come within the Act, what necessary to be shewn.]—22. If a defendant seek to set aside an attachment issued against him as an absconding debtor, on the ground that he never lived nor was in this province for such time or purpose as to bring him within the provisions of the Absconding Debtor's Act, he should shew those facts clearly to the court, and the court discharged a rule to set aside an attachment when those facts were not distinctly made out, and the party applying had not described himself in the affidavits as the defendant in the suit. *The Niagara Harbor and Dock Co. v. Smith*, Mich. Term, 7 Vic.

Who considered.]—23. Where a person usually residing in Scotland came to Upper Canada to settle some affairs, and while here referred some disputes which had arisen concerning them to arbitration, and an award was made against him which was not payable until nearly two years after he had left the province and returned to Scotland, and he had contracted no debts while here: *Held*, that he did not come within the Absconding Debtor's Act, and that the party to whom the money was made payable by the award could not, after it became due, proceed against him as an absconding debtor. *Taylor v. Nicholl*, i. U. C. R. 416.

Other Creditors setting aside Proceedings for Irregularity.]—24. Proceedings had in suits against an absconding debtor, contrary to the provisions of the statutes, may be set aside at the instance of other creditors of the absconding debtor. *Montreal Bank v. Burnham*, i. U. C. R. 131.

Priority of Executions.] — 25. Where a party sues out process and serves the debtor personally prior to the issuing of attachments under the Absconding Debtor's Acts, and obtains judgment before the attaching creditor, his execution is entitled to priority. *Bank of British North America v. Jarvis*, i. U. C. R. 182.

Copy of Process not being put up in the Crown Office—Not filing Affidavit—Irregularity.]—26. The not putting up in the crown office a copy of the process issued against an absconding debtor, as well as the not filing the affidavit the statute requires, before taking out execution, being mere irregularities, will not have the effect of making void what was done under the execution. *Doe dem. Boulton v. Fergusson*, v. U. C. R. 515.

Form of Attachment against Estate and Effects.] — 27. See *Meighan et al. v. Pinder*, ii. O. S. 292.

28. Proceedings under the Act by the creditor of an absconding debtor against his debtor.—Averments necessary in the declaration. See *Thompson v. Farr*, vi. U. C. R. 387.

Verdict.]—29. The creditor can only have a verdict for so much of the debt due to the absconding debtor as will cover his own debt against the absconding debtor. *Ib.*

ABSQUE HOC.

See PLEADING, VI. 4, 5.

ACCEPTANCE OF BILLS.

See BILLS OF EXCHANGE ETC., II. passim.

ACCIDENT.

See CARRIER, 5, 12, 13, 14, 16. CASE (ACTION ON THE), 10.

ACCOMMODATION BILL, OR
INDORSEMENT.

See BILLS OF EXCHANGE ETC., VI. 4, 5, 9, 10.

ACCORD AND SATISFACTION.

See ESCAPE, 26. PAYMENT, 6. PLEADING, II. 32, 35; V. 2.

Delivery of Goods necessary.—1. Goods agreed to be accepted in satisfaction and discharge of the causes of action in the declaration, and of all damages, &c., must be actually delivered; readiness to deliver will not do. *Thomas v. Mallory*, vi. U.C.R. 521.

[An order to deliver goods was held to be an insufficient satisfaction. *Griffiths v. Owen*, vii. M. & W. 58.]

2. *Semble*, that a plaintiff may, after breach of the promises stated in the declaration, legally agree to take a contract or new agreement to deliver goods, &c., in full satisfaction of the former promises and of the damages accruing from the breach of them. *Ib.*

When a Promissory Note may be taken in satisfaction.—3. Where an action is for tort, and the damages in the discretion of the jury—*Semble*, that a promissory note may be taken in satisfaction; the principle that a less sum of money cannot be taken in satisfaction of a greater not applying in such a case. *Lane v. Kingsmill*, vi. U. C. R. 579.

Common Counts—Damages 200l.—Plea, payment of 3l.—4. Declaration on the common counts, laying the damages at 200l. Plea—accord and satisfaction by the payment of 3l. in full of all damages in the declaration mentioned. *Held per Cur.*, on demurrer to plea, plea bad in setting up the payment of 3l. as a satisfaction of

200l. claimed. *O'Beirne v. Gowin*, vi. U. C. R. 582.

[In *Mitchell v. Cragg*, x. M. & W. 367—an action on a bill of exchange—the pleas were held bad in not averring that the sums paid equalled the amount of the bill.]

Surplusage in setting out a reference to Arbitration.—5. Where in trespass *quare clausum fregit* the defendant pleaded against the further maintenance of the suit, a reference to arbitration after action brought, and that the defendant paid five shillings to the plaintiff in pursuance of the decision of the arbitrators, in full satisfaction of the damages and costs, and the plaintiff demurred generally to the insufficiency of the statement of the reference to arbitration: *Held*, that the plea was a good plea of accord and satisfaction, and that all about the reference might be rejected as surplusage. *Hall v. Warner*, ii. U. C. R. 392.

Plea of Payment—Professing to answer too much.—6. To a declaration consisting of several common counts, claiming under one promise upon all the counts the sum of 500l., and laying the damages at 200l., the defendant pleads a payment of 250l. in full satisfaction and discharge of the said promise in the said declaration mentioned, and also of all damages sustained by reason of the non-performance of such promise—plea held bad on special demurrer. *Thompson v. Armstrong*, iii. U. C. R. 153.

Covenant, for non-payment of 300l.—Plea as to 50l. parcel, &c.—Demurrer.—7. To an action of covenant for the non-payment of 300l. on the days and times in the indenture mentioned, the defendant pleaded that as to the 50l., parcel of the sum of money in the breach assigned, the defendant saith that before, &c., he paid to the plaintiff the sum of 50l. in full satisfaction of the sum of 50l., parcel, &c., which the plaintiff then accepted in full satisfaction of the sum of 50l., par-

cel, &c.: *Held per Cur.*, on demurrer to plea, plea good. *Fralick v. Huffman*, v. U. C. R. 562.

Note for larger amount in satisfaction of Cause of Action amongst other things.]—8. Where in an action against the maker of a promissory note, he pleaded that he made another note to the plaintiff for a larger sum, which the plaintiff accepted in full satisfaction (*among other things*) of the note declared on; and the plaintiff replied (admitting the making and delivery of the second note), that the defendant did not deliver and he did not accept the same in full satisfaction and discharge of the note declared on (*among other things*, as by the defendant alleged); the replication was held good on special demurrer.] *Dee v. Cavanagh*, i. U. C. R. 380.

To breach of Covenant.]—9. Accord with satisfaction *held* to be a good plea to breach of covenant, and leave to withdraw the demurrer was refused. *Bayard et al. v. Partridge*, Tay. U. C. R. 558.

ACCOUNT.

See ACCOUNT STATED, 8.—ATTORNEY, IV. 5.—LIMITATIONS (STATUTE OF), III. 3, 9, 10.

ACCOUNT (ACTION OF)

See LIMITATIONS (STATUTE OF), III. 3.

Action between Tenants in Common or Joint Tenants.]—1. At common law there can be no action of account by one tenant in common or joint tenant, unless there has been an appointment of one by the other as bailiff. *Gregory et ux. v. Connolly*, vii. U. C. R. 500.

5 *Anne*, ch. 16.]—2. Under the statute 5 *Anne*, ch. 16, however, one tenant in common, or joint tenant, may be sued as bailiff in an action of account, whenever he has entered and taken more than his just share of the

profits, whether by appointment of his co-tenant or not. *Ib.*

Right of Coparceners to sue each other in account.]—3. *Semble*, that coparceners not coming within the statute 5 *Anne*, ch. 16, sec. 27, cannot sue each other in an action of account. The point, however, was not expressly decided, as the court held that in this case the facts shewed that the defendant entered into possession of the land not as a coparcener claiming through his wife and in privity with the plaintiff, but as an executor claiming adversely to the plaintiff without his consent; and that on that ground the action of account would not lie. *Ib.*

ACCOUNT STATED.

See ARREST, I. 20, 25.—BILLS OF EXCHANGE ETC., I. 7.—CONTRACT, 9.—DISTRICT COUNCIL, 10.—EXECUTOR ETC., II. 4.—LIMITATIONS (STATUTE OF), III. 4, ET SEQ.; IV. 9.—MONEY HAD AND RECEIVED, 6. NOLLE PROSEQUI, 2.—PARTNERS ETC., 3, 10.—STOCK NOTES, 1.

Express Promise.]—1. The plaintiff may recover on the count for an account stated on an express promise to pay the amount of an account, the admission of the correctness of which, by the defendant, cannot be received in evidence under 2 *Geo. IV.* ch. 13, the account being made up and rendered in New York currency, and the debt having been contracted in this province. *Crooks et al. v. Law*, Trin. Term, 7 Wm. IV.

Evidence under.]—2. In an action against one of two joint makers of a promissory note, who made it as a surety for the other, the note is not evidence under the count for an account stated. *Hogan v. Malone*, Hil. Term, 7 Vic.

Evidence of.]—3. A promissory note given to an agent upon a settle-

ment of accounts, may be used as evidence of an account stated with the person for whom he was acting when the fact of agency was known to the other party. *Rhodes v. Executors of Craicford*, i. U. C. R. 257.

Effect of Admissions by Executors.]

4. An admission by an executor of a debt due by his testator, is not sufficient to take the case out of the Statute of Limitations, in an action against the executor, without an express promise on his part to pay the debt admitted; but an account stated by an executor of a debt due by his testator which had never before such accounting been ascertained or determined, is sufficient to charge the executor as a substantive debt without any express promise to pay. *Watkins v. Washburn*, ii. U. C. R. 291.

Evidence of.]—5. In an action for goods sold, and upon an account stated, where the plaintiff's demand had been of several years' standing, and the jury gave a verdict for 18*l.*, the court upon a motion for a new trial, considered that evidence of an acknowledgment by letter of an account being due and of an account having been read over to the defendant, to which he made no objection, coupled with evidence that an item of 2*l.* which was contained in the bill of particulars produced in court, was the same with that read over to the defendant, and with the witness's belief that the accounts were the same, was sufficient to support the verdict, though one principal ground of the witness's belief of the accounts being correspondent arose from his knowledge of the plaintiff's character. *Large v. Perkins*, Tay. U. C. R. 75.

Evidence of.—Admissions to a third party.—Sale of Lands.—Statute of Frauds.]—6. A defendant casually observing to a third party, in the presence of the plaintiff, that he had paid the whole price for his land, except a certain sum, without any further explanation of the circumstances, is not

satisfactory evidence of an account stated. *Semble*: That if there had been satisfactory evidence of an account stated, the Statute of Frauds would not have applied, though the sum was due in respect of the sale of lands. *Curtiss v. Flindall*, iii. U. C. R. 323.

[The general principle is, that there must be a statement of some certain amount being due, which statement must be made to the party himself or to his agent. *Hughes v. Thorpe*, v. M. & W. 667.]

Agreement to pay Debt of another.]

7. Where A. as part consideration for the purchase of certain timber from B. promises C. to pay B.'s debt to him of 20*l.* and pays 10*l.* to C. and is to pay the remaining 10*l.* next morning: *Held per Cur.*—reversing the judgment of the court below—that C. could recover the 10*l.* on the account stated in an action against A. *Furgusson v. Kerr*, v. U. C. R. 261.

Note, prima facie evidence of.]—8.

A promissory note is prima facie evidence of a settlement of accounts up to the time of giving it. *Mitchell v. Jennings*, i. U. C. R. 537.

Statute of Frauds — 4th section, an item being for the sale of Lands.]

9. An item in an account stated, being the sum charged for the price of a lot of land, does not make it incumbent on the plaintiff to prove the agreement respecting such land to have been in writing. *Dalton v. Botts*, Tay. U. C. R. 380.

ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT.

See INTEREST, 1.

ACKNOWLEDGMENT OF TITLE.

See LIMITATIONS (STATUTE OF), II. 8, 9, 11, 12.

ACTION.

See ABATEMENT, 9.—ADMINISTRATION BOND, 1, 3.—APPRENTICE, 2. ARBITRATION AND AWARD, VI (2), 1.—ATTORNEY, II(1), 12.—BANKRUPT ETC., 12.—COMMON SCHOOLS, 2.—COVENANT, I. 8.—DISTRESS, II. 2.—ESCAPE, 20.—FERRY, 6.—LANDLORD AND TENANT, I. 4.—MAGISTRATES, 10.—MONEY PAID, 2.—NEW TRIAL, I. 12.—PARTNERS ETC., 16.—PRINCIPAL AND AGENT, 5.—TRESPASS, I. 13.—WATER, 5. 6.

Form.—1. Trespass or case will lie for seduction. *Cavan v. Walsh*, Mich. Term, 1 Wm. IV.

[Trespass or case will also lie for criminal conversation. *Chamberlain v. Hazlewood*, v. M. & W. 517.

Parties to sue.—Injury to Goods. Reversionary Interest.—2. A. has a reversionary interest in goods leased to B., the sheriff seizes the goods under an execution against B., but does not sell or remove them. A. sues the sheriff for an alleged injury to his reversionary interest. *Held*, that if any trespass was committed by the seizure, B. should sue and not A. *Henderson v. Moodie*, iii. U. C. R. 348.

Form.—3. Case and not trespass is the proper remedy against a sheriff for selling goods under a fi. fa. before the eight days are expired. *Moore v. Malcolm*, Tay. U. C. R. 370.

[But trespass and not case lies for taking a wrong person in execution. *Davies v. Jenkins*, xi. M. & W. 754.

Form of Action.—Goods sold.—Promise to pay by Bill.—4. Where in assumpsit for goods sold, the plaintiff produced two writings, by one of which he agreed to deliver to A. W. & Co. 100 barrels of pork at a certain price, and by the order signed by the defendant, "agent of A. W. & Co.," the defendant agreed to pay for pork by bill in favor of the plaintiff: *Held*, that although the defendant was per-

sonally liable on his undertaking, yet that the plaintiff should have brought his action against him for not furnishing the bill, and not for goods sold. *Counter v. Roebuck*, Easter Term, 3. Vic.

Malicious Arrests.—Forms of Action.—5. Though a writ of *capias* be set aside for irregularity, an action on the case will lie against the parties *suing out the same* maliciously. Trespass would be the proper form against the party *making the arrest*. *Cameron v. Playter et al.* iii. U. C. R. 138.

[*See* MALICIOUS ARREST, 5.]

Misjoinder of the Defendants in Assumpsit.—6. In joint actions of assumpsit a misjoinder of the defendants cannot be cured either by a *nolle prosequi* or by a nonsuit as to some of the defendants—a nonsuit as to some is a nonsuit as to all, and a verdict returned for some of the defendants is null and void. *Commercial Bank v. Hughes et al.* iv. U. C. R. 167.

ACTION (NOTICE OF).

See NOTICE OF ACTION.

ADDING COUNTS.

See AMENDMENT, II. 17, 33.

ADMINISTRATION.

See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATION BOND.

See PLEADING, II. 6.

In the name of the Governor may be sued on in the name of his Successor—Averments.—1. *Semble*, an administration bond taken in the name of the Governor or the person administering the government of the province for the time being, is good under the Probate Act, and may be sued on in the name of any succeeding Governor

or person administering the government; and in an action upon such a bond it is sufficient, on *general* demurrer, to allege in the breach that the administratrix wasted goods that came to her hands, without specifically alleging that goods did come to her hands, and also that she wasted the goods and converted them to her own use. *Metcalfe v. McKenzie et al.*, ii. U. C. R. 103.

Averment of goods coming into hands of administrator—Time.—2. In such an action the declaration is bad on *special* demurrer, if the plaintiff merely aver that the administratrix did not well and truly administer the goods, &c., which came to her hands, without distinctly averring that goods did come to her hands; and it is also necessary that *time* should be laid to the averment that goods did come to her hands to be administered. *Metcalfe v. McKenzie et al.* ii. U. C. R. 329.

In whose name action to be brought—Former Governor—Subsequent Governor.—3. In an action on an administration bond given to a former Governor of the province, it is sufficient, even on special demurrer, that the action is brought in the name of a subsequent Governor. *Metcalfe v. McKenzie et al.*, ii. U. C. R. 329.

Action against a married woman married after administration granted.—4. Where the action was brought against an administratrix who had married since administration, and her sureties, and the breach averred that the defendants did not pay the penalty of the bond—it was held sufficient on special demurrer without alleging that she did not pay while she was sole and unmarried, but the bond being conditioned that she should exhibit an inventory into the Court of Probate on the first Monday in *June*, and the breach being that she did not exhibit an inventory on the first Monday in the *year*, it was held bad on general

demurrer. *Metcalfe v. McKenzie et al.*, ii. U. C. R. 103.

ADMINISTRATION (LETTERS OF).

See LETTERS OF ADMINISTRATION.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATOR DE BONIS NON.

See EXECUTOR ETC., I. 5.—II. 7, 8.

ADMISSION OF DOCUMENTS.

See BOND, II. 10.

ADMISSIONS.

I. IN PLEADINGS.

See PLEADING, IX.

II. AS EVIDENCE.

See EVIDENCE, VII.

ADVERSE POSSESSION.

See LIMITATIONS (STATUTE OF), II.

ADVOCATE.

See ATTORNEY, IV. 2, 3.—COUNSEL.

AFFIDAVIT.

See ABSCONDING DEBTOR, *passim*.—ARBITRATION AND AWARD, VI(1), 2, 3, 5; VIII. 10.—ARREST, I.—ATTACHMENT, II. 2, 10.—CAPIAS AD RESPONDENDUM, 3.—CAPIAS AD SATISFACIENDUM, 1, 3, 12.—COMMISSION TO EXAMINE WITNESSES, *passim*.—COSTS, IV(1), 8, 9, 11.

DOWER, II. 3.—EJECTMENT, III. 4, 6, 7, 8, 9, 12, 13; V. 1, 4.—EVIDENCE, IV. 2.—JUDGMENT, 7.—JUDGMENT AS IN CASE OF NONSUIT, III. 2, 3.—JURY, 9.—NEW TRIAL, XI. 3. 4.—PRACTICE, II. passim. RECOGNIZANCE, 6.—SECURITY FOR COSTS, 2, 3.

Jurat.]—1. In the jurat of an affidavit sworn by an illiterate person, the omission of the statement that the deponent appeared to understand it is fatal. *Moore v. James*, Dra. Rep. 245.

Jurat.]—2. An affidavit made by two persons not stating distinctly in the jurat that both were sworn, cannot be read. *Nicholson dem. Spafford v. Roe*, iii. O. S. 84.

[Case in 7 T. R. 82, upheld.]

3. But an amendment will be allowed by the insertion of their names. *Fisher v. Thayer*, Trin. Term, 7 Wm. IV.

Intituling of—Initial letters.—4. Where all the affidavits in a cause after verdict were intituled with an initial letter between the christian and surname of the defendant—it was held that it was no objection to an affidavit made by the defendant himself that the second name was not set out at length, as the initial might be nothing more than a distinctive letter. *Kendrew v. Allen*, Trin. Term, 4 & 5 Vic.

Intituling.]—5. In intituling an affidavit in a cause, the additions of “plaintiff” and “defendant” must be inserted. *Brown v. Simmonds*, i. U. C. R. 280.

[Upheld in *Chafe v. Parr*, ii. U. C. R. 98.]

Sworn before partner of attorney.]—6. An affidavit sworn before the partner of the attorney of the party on whose behalf the affidavit is made, cannot be read. *Hadley v. Hearn et al.*, i. U. C. R. 405.

[See also *White v. Petch et al.* NEW TRIAL, XI. 3.]

Verifying copy of paper.]—7. An affidavit verifying the copy of a

paper, “that it is a true copy, as the defendant is informed and verily believes,” is sufficient. *Chafe v. Parr*, ii. U. C. R. 98.

Jurat—Commissioner.]—8. The jurat of an affidavit is sufficient if it contain the signature of the commissioner who took it, without the addition of any words shewing him to be a commissioner. *Henderson v. Harper*, ii. U. C. R. 97.

[Upheld in *Brown et al. v. Parr*, ii. U. C. R. 98. *Murphy v. Boulton*, iii. U. C. R. 177.]

[But the omission “before me” would be considered fatal. *Reg. v. Norbury*, vi. Q. B. 534.]

Jurat.]—9. An affidavit was not considered inefficient, because the place of taking it was omitted in the jurat. *M’Lean v. Cumming*, Tay. U. C. R. 240.

[Also, *Fairbrass v. Petit*, xii. M. & W. 453. Contra: *Boyd v. Strader*, vii. Price, 662. *Rex v. Cockshaw*, ii. N. & M. 278.]

Deponent’s Degree.]—10. *Semble*: Under our rule 2 Wm. IV. it is not necessary in any case to state in an affidavit of either the plaintiff or the defendant the deponent’s degree, certainly not where the affidavit is sworn in a foreign country. *Ewing et al. v. Lockhart*, iii. U. C. R. 248.

[*Quere*: Whether the defendant having given bail to the limits, would not preclude him from taking a formal objection of this kind? *Ib.*]

Commissioner — Interlineations — Jurat.]—11. It is not necessary that a commissioner should put his initials opposite interlineations in the affidavit itself, or notice such interlineations in the jurat. *Lyster v. Boulton*, v. U. C. R. 632.

AFFIDAVIT TO HOLD TO BAIL.

See ARREST, I.

AFFIRMATION.

See ARREST, I. 39.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See ARREST, IV. 12.—ASSUMPSIT, *passim*.—BILLS OF EXCHANGE ETC., VII. *passim*.—BOND, II. 13.—COMMON SCHOOLS, *passim*.—CONTRACT.—COVENANT, I. 9; II (2), 6, 16.—DEMURRAGE, 2.—DISTRICT COUNCIL, 3.—EJECTMENT, I. 16, 17, 19, 22, 23; VIII. 9, 10, 11.—EVIDENCE, I. 5, 6, 7.—EXECUTOR ETC., I. 7.—FRAUDS (STATUTE OF), I. 2, 3, 4, 5, 6.—GOODS SOLD, 9.—LANDLORD AND TENANT, I. 1.—PENALTY.—PLEADING, II. 16.—STOCK NOTES.—SUNDAY.—TERM'S NOTICE, 1.—USURY, 11, 12.

Want of consideration disclosed on the face of agreement.]—1. An agreement declared upon in the following manner was held to be bad, as disclosing an agreement void in law for want of a legal consideration to support it: "That it was amongst other things agreed, that in consideration that the plaintiff had leased from the defendant certain lands at 5s. per acre, the defendant undertook and promised that he would within a certain time build a house and barn on the premises so demised, and that for every acre of land cleared and fenced in fields, not exceeding 7½ acres, by the plaintiff, he, the defendant, should pay to the plaintiff 3l. for every acre of land so cleared and fenced as aforesaid." *Cunningham v. Richardson*, vii. U. C. R. 163.

Substitution of new agreement.—original consideration imported into new.]—2. While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it, postponing the period for performance, and the original consideration will be

regarded as imported into such new agreement and will be sufficient to support it. *Hurlburt v. Thomas*, iii. U. C. R. 258.

Construction of.]—3. In trespass for mesne profits, before the verdict was taken, the plaintiffs and the defendant signed a paper, by which it was agreed "that in case a verdict shall be given for the plaintiff, the costs in the suit shall be left to be taxed by &c., and the value of the mesne profits shall be decided by, &c." The court held that the words "in case a verdict shall be given for the plaintiff," did not preclude the defendant from contending against a verdict at the trial, upon any grounds he might have in law, or upon the merits. *Patterson v. Prince*, vii. U. C. R. 528.

Agreement to deliver timber in certain appointed places—Notice before action.]—4. Where by an agreement the plaintiff is to deliver not personally to the defendants, but to certain parts of a road, a certain quantity of timber to build certain bridges, he must notify the defendants of the delivery before he can bring an action. *Watson v. Gowen et al.*, vi. U. C. R. 542.

ALBION ROAD.

Tolls.—When to be collected on Vaughan Branch.]—*Semle*: That tolls on the Vaughan Branch of the Albion Plank Road can only be collected when the road is made, according to the requisition contained in the 33d section of the statute 9 Vic. ch. 88. *Regina v. Haystead*, vii. U. C. R. 9.

ALDERMAN.

See INDEMNITY ACT, 2.

ALIAS FIERI FACIAS.

See FIERI FACIAS, 1, 3, 10.

ALIEN.

See EVIDENCE, V. 1.—NATURALIZATION.

Conveyance to.—Title of persons claiming through.—1. A conveyance in fee to an alien is not void, but he holds for the benefit of the Crown and is entitled as against others until the land is seized into the hands of the Queen on office found; and if a subject be a trustee for an alien, he has the legal estate, and the Queen is entitled to the profits; and a person claiming through an alien may have a good title, although the alien himself would hold only for the benefit of the Crown. *Doe dem. Richardson v. Dickson*, ii. O. S. 292.

Who is an.—2. A person who was born in the United States before the revolution and has continued to reside there since, is an alien and cannot maintain ejectment in this country. *Doe dem. Paterson v. Davis*, Easter Term, 7 Wm. IV.

Conveyance of.—Defence of alienage.—3. The conveyance of an alien is good except as against the Crown; and where a subject has conveyed to an alien he cannot afterwards, on an ejectment by the grantee of the alien, set up the alienage as a defence for his own benefit; nor will such a defence avail him in an action by the alien himself; and where the defence of alienage is made, it must be clearly shewn that the party is in fact an alien, by proof of his place of birth, &c. *Doe dem. Macdonald v. Cleveland*, Hil. Term, 4 Vic.

Who entitled under 9 Geo. IV. ch. 21, to inherit land.—4. The son of a woman who was a British subject but who was married to an alien out of the King's allegiance at the time of her son's birth, is not entitled under the provincial statute 9 Geo. IV. ch. 21, to inherit land which had been granted to his mother in this province. *Doe dem. Robinson v. Clarke*, i. U. C. R. 37.

Purchaser at sheriff's sale.—Right to recover in Ejectment.—5. *Semble*: A person claiming lands under a sheriff's deed is entitled to recover in ejectment notwithstanding 5 Geo. II. ch. 7; it being necessary to take the objection of alienage, if available at all, before execution. *Doe dem. Richardson v. Dickson*, ii. O. S. 293.

Not deprived of right to execution against lands of debtor.—6. Alien friends residing in their proper country cannot, upon a summary application to the court, be deprived, under the words of the statute 5 Geo. II. ch. 7, of their right to an execution against the lands of their debtor. *Semble*: The alienage should be pleaded in bar of execution. *Wood et al. v. Campbell*, iii. U. C. R. 269.

ALIEN NE (PLEA OF).

See ALIEN, 3.—DOWER, II. 8.

ALLEGIANCE.

See EVIDENCE, V. 1.

ALLOCATUR.

See ATTACHMENT, II. 8.—ATTORNEY, III. 16.

ALLOWANCE FOR ROAD.

See EVIDENCE, I. 1; II. 12.—HIGHWAY, passim.—TRESPASS, I. 11.

ALTERATION.

See BILLS OF EXCHANGE ETC., IV. 8; V. 9.

Alteration of a joint note without the consent of one of the makers, who was afterwards sued on it.—Where a note originally joint was altered to joint and several without the consent of one of the makers, who was afterwards

sued alone upon the note by an indorsee: *Held*, that the plaintiff could not recover on the note on account of the alteration, nor on the money counts, as there was no privity between the maker and him. *Samson v. Yager*, Mich. Term, 5 Wm. IV.

AMENDMENT.

- I. OF WRIT AND RETURN.
- II. OF PLEADING AND RECORD.
- III. OF VERDICT, POSTEA AND JUDGMENT.
- IV. OF OTHER PROCEEDINGS.

I. OF WRIT AND RETURN.

Of fi. fa. lands after sale.—1. An amendment was allowed in a fieri facias against lands, after sale under it by the sheriff. *Fleming v. Executors of Wilkinson*, Trin. Term, 1 & 2 Vic.

Defective ca. sa. not amendable.—2. Where a defendant had been arrested on a writ of capias ad satisfaciendum, which did not specify any sum as the amount for which judgment had been awarded, the court refused to allow an amendment, as the writ was defective, and not merely irregular. *Billings et al. v. Rapelje, et al.*, Easter Term, 4 Vic.

Wrong christian name in ca. sa. not amendable.—3. On a motion to set aside an arrest for irregularity, because one of the defendant's christian names was wrong in the affidavit of debt and writ, an amendment by the insertion of the right name was refused and the arrest set aside. *Allison v. Wagstaff*, Michs. Term, 7 Vic.

Amendment of fi. fa. original to testatum, allowed.—4. The court allowed an original writ of fi. fa. to an outer district to be amended by making it a testatum, and an original writ to warrant the testatum to be sued out, after the first writ had been placed in the sheriff's hands and after

a motion to set aside proceedings for irregularity—without costs; and discharged the rule for setting aside the proceedings without costs. *Fisher v. Brooks*, iii. O. S. 143.

Ca. re.—Address—Cause of action—Teste amendable.—5. The court permitted an amendment to be made in the address, cause of action, and teste of a writ of capias ad respondendum. *Myers v. Rathburn*, Tay. U. C. R. 159.

Ca. re. original not amendable to testatum.—6. When a writ is bailable, the court will not amend an original ca. re. by making it a testatum, though a precipe for a testatum be filed. *Campbell v. Hepburn*, Dra. Rep. 3.

Fi. fa. amendable so as to relate to day of entry of judgment.—7. A writ of fi. fa. may be amended so as to have relation to the day of the entry of the judgment. *Andruss v. Page*, Tay. U. C. R. 478.

Amendment of return to fi. fa. ordered.—8. Where a sheriff returned "goods on hand" to a fi. fa., when he had in fact made no seizure, and the plaintiff issued a ven. ex. but discovering that no seizure had been made subsequently issued another writ of fi. fa., under which the defendant's goods were seized, the second writ was set aside with costs, which the sheriff was ordered to pay and to amend his return to the first writ in accordance with the facts, so that the plaintiff might issue another writ against the defendant's goods. *Lemoine v. Raymond*, ii. U. C. R. 378.

[See SHERIFF, I. 13.]

II. OF PLEADINGS AND RECORD.

See COSTS, III. 5.—JUDGMENT OF NON PROS, 2.—MALICIOUS PROSECUTION, 2.—NEW TRIAL, X. 20. NUL TIEL RECORD, 2.—PRACTICE, I. 11, 22, 24.—REPLEVIN ETC., 10.—VERDICT, 8.

Declaration amended by striking out names of parties not served.]—1. Where the plaintiff had declared against several defendants, when only one had been served, an amendment was allowed by striking out of the declaration the names of those not served. *Zavitz v. Hoover*, Mich. Term, 1 Vic.

Substitution of "promise and undertaking," for "promises and undertakings," allowed.]—2. The plaintiff was allowed to amend his declaration after issue joined on nulier record, by substituting "promise and undertaking," for "promises and undertakings," although there had been a trial on other issues concluding to the country. *Church v. Barnhart*, Dra. Rep. 456.

Declaration in ejectment—Amendment of locus in quo not allowable.] 3. The court refused an amendment in a declaration in ejectment by altering the name of the township in which the lands for which the action was brought were stated to be situated. *Doe v. Roe*, Dra. Rep. 170.

After assessment of contingent damages and unsuccessful demurrer.] 4. Amendment of pleadings will be allowed after the assessment of contingent damages on a demurrer subsequently decided against the plaintiff, where the justice of the case requires it, and the plaintiff would be finally concluded. *Breakenbridge v. King*, Trin. Term, 5 & 6 Wm. IV.

(*Also Maxwell v. Ransom*, infra 31.) (But an amendment upon demurrer, will not be allowed after verdict on issues in fact, *Crucknell v. Trueman*, ix. M. & W. 684).

Amendment of record after appeal to the King.]—5. A record was amended in matter of form, after an appeal to the King in council. *Rowand v. Tyler*, Easter Term, 7 Wm. IV.

Amendment of declaration by inserting a special averment.]—6. Where a bond having been pleaded with a

profert, oyer had been demanded, and it was set out by the defendant on the record, but the bond was not produced at the trial, and the judge refused to allow an amendment by an averment of the loss of the bond, but left it to the jury under the statute, who found specially that the bond was lost: *Held*, that on such finding the plaintiff was entitled to judgment according to the merits of the case, and the amendment was allowed. *Ketchum et al. v. Ready*, Trin. Term, 3 & 4 Vic.

Variance between pleadings and record produced, amendable.]—7. Where on trial by record, there was a variance between the pleading on which the issue was raised and the record produced—the court allowed an amendment, although a trial had been had on other issues. *Lawrence et al. v. Har-day*, Trin. Term, 3 & 4 Vic.

Amendment of ejectment record at Nisi Prius, by correcting date of demise, allowable.]—8. Where the demise laid in ejectment was anterior to the time when the lessor's title accrued: *Held*, that an amendment in the record to correspond with the correct time was properly allowed at nisi prius. *Doe dem. Sinclair v. Arnold*, Hil. Term, 4 Vic.

Amendment of breach after unsuccessful demurrer, two terms after judgment delivered, refused]—9. Where in an action against a sheriff's sureties several issues were joined in law and fact, and after trial and assessment of contingent damages, judgment was given for the defendant upon the demurrers, which were only to a part of the declaration, and a new trial granted him on payment of costs—the court would not, two terms afterwards, allow the plaintiff to amend the breach upon which the defendant had obtained the judgment on demurrer. *Watson et al. v. Hamilton*, Trin. Term, 4 & 5 Vic.

[See next case.]

Amendment by defendant on affidavit of merits, judgment on demur-

*rer being in favor of plaintiff.]—*10. When the plaintiff has judgment on demurrer, the court will sometimes allow the defendant to amend on an affidavit of merits, even although the plaintiff has lost a trial. *McCrae v. Hamilton*, Mich. Term, 5 Vic.

[As to amendments after unsuccessful demurrers, see cases 26, 27, 28, 29, 30, 31 and 38, *infra*.]

*Variance between contract set out and that proved—Amendment with costs allowed in banc.]—*11. Where the plaintiff was nonsuited for a variance between the contract set out and that proved, the judge at the trial having refused to allow an amendment—the court, under the particular circumstances, granted a new trial and leave to amend on payment of costs. *Lawrence v. Tindal*, Mich. Term, 5 Vic.

*Nisi Prius record withdrawn and sealed before jury sworn—Amendment allowed.]—*12. Where a record had been entered for trial at the assizes for the Home District without having been sealed, and the omission was not discovered until the morning of the trial, which was several days after the commission day, when the judge at Nisi Prius allowed the record to be withdrawn, sealed and re-entered, the court refused to set aside the verdict for irregularity, holding that the judge had power to allow the amendment before jury sworn. *McLean v. Neeson et al.*, Trin. Term, 5 & 6 Vic.

*Amendment in jurata of Nisi Prius record, allowed.]—*13. Where in the jurata in the nisi prius record the time and place of holding the assizes were both wrong, being of a different day and of another district than that in which the venire was laid and the cause entered for trial, the judge at Nisi Prius allowed an amendment to the proper time and place, and the court considered that the amendment was properly allowed. *Doe dem. Corbett v. Sproule*, Trin. Term, 5 & 6 Vic.

*Amendment of jurata after new trial granted.]—*14. Amendment of jurata ordered in banc, where a new trial had been ordered and the plaintiff had neglected to alter the jurata, in consequence of which the judge at Nisi Prius had declined to try the cause. *Doe dem. Crooks v. Cummings*, i. U. C. R. 256.

[See next case.]

15. *Held*, that the Nisi Prius record not having been altered after a new trial granted, but the entry being allowed to continue as before, of the jury being respited till the term next following the preceding assizes, the defect could not be cured by amendment. *Smith v. Shaver*, vi. U. C. R. 20.

*Trespass quare clausum fregit—Amendment of locus in quo allowed.]—*16. In trespass quare clausum fregit and a plea of not guilty, a judge at Nisi Prius may amend the description of the locus in quo in the declaration; but a description of a house being on the corner of a lot is not supported by shewing that it is near the corner, but that there are two or three other houses between it and the corner. *Stanton et al. v. Windeat*, i. U. C. R. 30.

*In ejectment by tenants in common on a joint demise, an amendment to separate demises is not allowable.]—*17. Where tenants in common bring their action upon a joint demise, and application is made at the trial for a non-suit, they will not be allowed to amend by adding counts on separate demises. *Doe dem. Anderson et al.*, v. *Errington*, i. U. C. R. 159.

18. Where the demise in a declaration of ejectment is laid as joint, and the evidence shews a tenancy in common, the judge at Nisi Prius has not the power under the stat. 7 Wm. IV., ch. 3, of allowing an amendment. *Doe dem. Cuvillier et al. v. James*, iv. U. C. R. 490.

*Name of lessor of plaintiff.]—*19. *Quare*: Whether a judge at Nisi Prius

can properly allow an amendment to be made in the name of the lessor of the plaintiff? *Doe dem. Ausman v. Munro*, i. U. C. R. 160.

Amendment must be made at trial when allowed.]—20. Where at Nisi Prius leave is granted to a plaintiff in ejectment to amend the record by altering the name of the lessor of the plaintiff, and neither the amendment nor any order for it on the record or postea is made at the time, the defendant will not be allowed subsequently to make it. *Doe dem. Ausman v. Munro*, i. U. C. R. 277.

Replevin.—Amendment of demise at Nisi Prius.]—21. A judge at Nisi Prius has the power of making an amendment in the terms of a demise in an avowry in replevin. *Leader v. Smith*, i. U. C. R. 366.

At Nisi Prius by adding joinder in demurrer, allowed.]—22. Where in trespass quare clausum fregit, the defendant had pleaded a special plea, to which the plaintiff had demurred, but in making up the Nisi Prius record had omitted to enter the joinder in demurrer, the court held that an amendment, by allowing it to be added, was properly made at the trial. *Boulton v. Fitzgerald et al.*, i. U. C. R. 476.

Penal action—Making declaration to correspond with evidence, not allowable.]—23. Where after verdict for the plaintiff and new trial granted for a variance between the statement of the loan and forbearance as laid and that proved in a qui tam action for usury, the plaintiff moved to amend his declaration by making it correspond with the evidence at the trial—the court discharged the rule. *Fraser qui tam v. Thompson*, i. U. C. R. 522.

Time to make amendment.]—24. On a variance between proof and deed declared on, counsel must determine at the trial whether they will amend under the statute: leave cannot be re-

served to amend the record afterwards. *McFarlane v. Brown*, v. U. C. R. 471.

Amendment of Variance.]—25. Where the defendant set up a deed as made between A. B. of the one part, and the Bank of British North America of the other, and when produced at the trial it turned out to be a deed made between A. E. and Mr. Thomas Paton, who was afterwards stated in the body of the instrument to be inspector of the bank: *Held*, that the variance was fatal and could not be amended. *Bank of British North America v. Sherwood*, vi. U. C. R. 552.

After judgment on demurrer.]—26. After judgment on demurrer an amendment will not be allowed, unless under very special circumstances, and the motion must be promptly made. *Counter et al. v. Hamilton*, i. U. C. R. 6.

27. The court, under special circumstances, allowed an amendment of the defendants' pleadings, after argument and judgment on demurrer against their rejoinder. *Hamilton v. Davis et al.*, i. U. C. R. 526.

28. After verdict for the plaintiff, and contingent damages assessed, judgment was given for the defendant on demurrer—the court refused to allow the plaintiff to amend his replication. *Phillips v. Smith*, Dra. Rep. 303.

29. After an unsuccessful demurrer, the court, in the exercise of their discretion, will sometimes refuse to allow a party to amend and plead to the action. *Bacon v. McBean et al.*, iv. U. C. R. 104.

30. Where a judgment was given for plaintiff on demurrer to defendant's pleas, with leave to defendant to amend his pleas on payment of costs, which costs were to include the costs of the day of the last assizes, the case having been made a remanet—the court, on discovering that the defendant had a

cross action against the plaintiff at the same assizes, (of which they were not aware at the time they gave their former judgment), and that the causes had, by the consent of both parties, been made remanets, allowed the amendments to be made on payment of the costs of the demurrer: and *Semble*, that at any rate this would have been the proper course. *McKenzie v. Gibson*, vii. U. C. R. 527.

31. Where damages have been assessed in a cause subject to a demurrer, and the demurrer is decided against the party assessing damages, the court will not hold itself precluded from allowing an amendment in the pleadings demurred to. *Maxwell v. Ransom*, i. U. C. R. 281.

Term's notice.]—32. After four terms have elapsed since the last proceeding, an amendment cannot be made in a declaration without a term's notice. *Doe dem. Lick v. Ausman*, i. U. C. R. 399.

Amendment by adding a count, refused.]—33. In trespass quare clausum fregit, where judgment was given against the plaintiff on demurrer for defects in his replication, and the plaintiff desired to amend by adding a count for assault, the amendment was refused. *Henderson v. Harper*, i. U. C. R. 528.

Amendment of special damage in libel to meet the evidence at Nisi Prius.]—34. The plaintiff, a schoolmaster, sued the defendant for a libel, and laid as its consequence, by way of special damage, his dismissal from his school; whereas it appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent, with a view to his qualification, for receiving a renewal certificate. The plaintiff applied to the judge at Nisi Prius to amend his special damage to meet the evidence, which the learned judge allowed: *Held*, on motion for a nonsuit, that the judge to Nisi Prius had power to make such

amendment. *Jackson v. Simpson*, iv. U. C. R. 287.

Amendment allowed with costs—Costs not paid.]—35. Where judgment had been given against a defendant on demurrer, and he was allowed to amend on payment of the costs, and the costs were not paid, the rule was made absolute to enter the judgment for the plaintiff. *Skinper v. ———*, Easter Term, 3 Vic.

Record—Award of Venire amendable.]—36. An irregularity in the award of venire is amendable by the court. *Whitelaw v. Davidson*, vi. U. C. R. 534.

Mistake in demurring to right pleading.]—37. Where the defendant, instead of demurring to the plaintiff's replication to his second plea, as he intended, demurred to the replication to his first plea, so that upon the second plea no issue was joined, the court set aside the verdict and allowed the parties to amend their pleadings. *Perry v. Grover*, v. U. C. R. 468.

Amendment a second time, after judgment pronounced.]—38. Where upon the argument of a general demurrer to a declaration, several objections were raised, which the court intimated were not bad in substance, but might have been sustained if specially assigned, and judgment having however been given in favor of the demurrer, the plaintiff amended and filed a new declaration, which was open to several of the same objections as had been urged on general demurrer, but which the defendant then objected to specially, and on the argument it was suggested to the plaintiff's counsel to amend, but he did not do so, and the court afterwards gave judgment against him—he was subsequently refused leave to amend. *Metcalf v. McKenzie et al.*, ii. U. C. R. 404.

Demurrer and issues in fact to the same cause of action.]—39. Where there were several counts in a decla-

ration varying the same cause of action, to which the defendant pleaded distinct pleas, and the plaintiffs having demurred to some of the pleas, and replied to the others after judgment against them on the demurrers, recovered a verdict on the other pleas, no defence having been made at the trial—the court held, that, under the pleadings, the plaintiffs' recovery was barred; but under the circumstances of the case they granted a new trial, and gave the plaintiffs leave to amend. *Watson et al. v. Hamilton*, Easter Term, 5 Vic.

III. OF VERDICT, POSTEA AND JUDGMENT.

See BOND, II. 3.

Amendment of verdict by Judge's notes.—1. A verdict taken for the amount of a penalty of a bail bond to the limits, was allowed to be amended by the judge's notes, by reducing it to the sum indorsed on the capias ad satisfaciendum, with interest and the sheriff's fees. *Callaghan v. Strobbridge*, Dra. Rep. 167.

Amendment of general to special verdict, without costs.—2. Where a general verdict has been returned for the plaintiff on several counts, one of which is bad, but it appears the plaintiff elected to proceed on a good count at the trial, the court will allow the verdict to be amended after motion in arrest of judgment without costs. *Gouldrich v. McDougall*, ii. O. S. 212.

3. Where the evidence at the trial was applicable to a good count only, and a general verdict was given, the court allowed an amendment without costs, by entering the verdict on the good count after a motion in arrest of judgment. *Beasley v. Darling et ux.*, ii. O. S. 214.

4. Where a verdict was entered for the plaintiff at Nisi Prius on all the counts of the declaration, when he

gave evidence, and was entitled to recover only upon one, the verdict was ordered to be amended by the judge's notes, and to be entered for the defendant on the other counts. *Chadwick v. McPherson*, ii. U. C. R. 379.

Several counts—General verdict—Some counts bad—Amendment allowed.—5. Where the plaintiff has a general verdict upon a record containing several counts, and the defendant moves to arrest the judgment on the ground that some of the counts are defective, and the plaintiff asks leave on the return of the rule to amend his verdict by confining it to a good count: *Held*, that if the evidence at the trial apply *equally* to the good and bad counts, the amendment may be made. *Baldwin qui tam v. Henderson*, iv. U. C. R. 361.

6. When it appears on the notes of the learned judge at the trial that a verdict should be entered for the plaintiff on one count, and for the defendant on the other, and a verdict has been erroneously entered for the plaintiff on both counts—this is a mere mistake in the entry on the record, which may be amended by the judge's notes. *City Bank v. Eccles*, v. U. C. R. 633.

District Court—Excess of jurisdiction—Remission of excess allowable.—7. *Semble*, that the plaintiff on a verdict in the District Court for a sum exceeding its jurisdiction, may retain his verdict by remitting the excess of jurisdiction. *Jordan v. Marr*, iv. U. C. R. 53.

[See next case also, which fully decides the point.]

8. Where a verdict has been given for the plaintiff in a District Court for a sum beyond its jurisdiction, he may cure the defect by entering on the record a remittitur for all damages beyond its jurisdiction. *Thomas v. Hilmer*, iv. U. C. R. 527.

If evidence be given on several counts, verdict must be entered on all

of them.]—9. In an action on the case for waste, where the first two counts were for voluntary waste, and the fourth count in trover, the third being for permissive waste by a tenant at will, an application to amend the postea by entering the verdict on the 1st, 2nd and 4th counts alone, was refused, evidence having been given on the third count. *Drummond v. Carthew*, Trin. Term, 3 & 4 Vic.

When postea amendable by judge's notes, and judgment by postea.]—10. The court will amend a postea by the judge's notes, and amend a judgment by the postea, *after an appeal allowed*, and reasons of appeal assigned, the verdict having been taken generally for the plaintiff on points reserved, and the postea being framed as if the general issue only had been pleaded, without noticing several other special pleas of the Statute of Frauds. *Rochleau v. Bidwell*, ii. O. S. 319.

Assessment of damages to a greater amount than declaration warrants.—Reduction allowed on payment of costs.]—11. Where in debt the plaintiff had assessed damages to a greater amount than the declaration warranted, and had entered judgment for that amount, as if the form of action had been assumpsit, and issued executions some in debt and some in assumpsit, an amendment was allowed by reducing the damages &c., on payment of costs. *Averill v. Powell*, Mich. Term, 2 Vic.

Judgment roll amended by addition of costs.]—12. The court allowed a judgment roll to be amended by adding the costs. *Wright v. Landell*, Tay. U. C. R. 416.

Judgment against administrator—Intestate's name amended.]—13. In a judgment on a scire facias against an administrator, an amendment was allowed in the name of the intestate, by making it correspond with the name in the original judgment against him. *Willard v. Woolcot*, Dra. Rep. 211.

Debt on bond—Verdict in debt on simple contract—Judgment in assumpsit.—Ca. sa. in debt—Amendment allowed, with costs.]—14. Where, in debt on bond and breaches assigned in the declaration, the plaintiff entered his verdict as if the action had been debt on simple contract, and entered judgment in assumpsit, and issued a capias ad satisfaciendum in debt, on which defendant was arrested: the court set aside the ca. sa. with costs, and allowed the plaintiff to amend on payment of costs. *Edison v. Hogadone*, Mich. Term, 3 Vic.

IV. OF OTHER PROCEEDINGS.

See BAIL, III. 3.—CONVICTION, 3.—COSTS, IV(1), 7, 11.—DEMURRER, 6.—EJECTMENT, II. 7, 8; IV(1), 6, 7.—INDORSEMENT, I. 6.—PRACTICE, II. 24; III. 2.—VENUE, 3.

APOTHECARY.

See LIBEL AND SLANDER, III(2), 5.

APPEAL.

See BILLS OF EXCHANGE ETC., V. 19. BOUNDARY LINE COMMISSIONERS, 1.—JUDGE (IN CHAMBERS), 3. LIMITS, I. 6.—MAGISTRATES, 4.

Proceedings under Petty Trespass Act.—Appeal to Quarter Sessions, and from Quarter Sessions to Queen's Bench.]—1. Where a person convicted under the Petty Trespass Act had appealed to the Quarter Sessions, where the conviction was confirmed, no appeal lies from thence to the Queen's Bench. *Regina v. Impey*, Hil. Term, 4 Vic.

From District Court to Queen's Bench, in a trifling matter.]—2. The court in banc. will not overrule the opinion of the judge and jury in a district court, on the question of weight of evidence in a trifling matter, espe-

cially when a new trial could not be granted without paying costs. *Fowler v. McDonald*, iii. U. C. R. 385.

Appeal from District Court on points of practice.]—3. The court will not sustain an appeal from the court below upon the question, whether the plaintiff or the defendant was entitled first to address the jury. *Hastings v. Earnest*, vii. U. C. R. 520.

Appeal—Special points of Demurrer.]—4. *Semble*, that upon appeals to this court from the district courts on points of special demurrer, it does not follow that effect will be given to all objections which would be allowed to prevail in this court. *Outwater v. Daeoe*, vi. U. C. R. 256.

Appeal from District Court by writ of error, not allowable.]—5. Where a district court makes an order or pronounces a judgment, from which either party can appeal under the 57th clause of the 8th Vic., ch. 13, that is the method of appeal the party must follow, and not by writ of error. *Thomas v. Hilmer*, iv. U. C. R. 527.

4 & 5 Vic., ch. 7—*Charge of assault before magistrates—Dismissal—Appeal to Quarter Sessions—Refusal by justices—Mandamus.*]—6. Where a charge of assault was preferred before two magistrates, under 4 & 5 Vic., ch. 7, who dismissed the complaint, ordering the complainant to pay the costs, and the justices in sessions would not entertain an appeal—the court refused to grant a rule for a mandamus to the justices in sessions to hear the appeal, on the ground that the statute contemplates an appeal only in cases of convictions. *Justices of Brock District, In re.*, Mich. Term, 6 Vic.

APPEARANCE.

See FOREIGN JUDGMENT, 12.—INTERLOCUTORY JUDGMENT, 8.—INTERPLEADER, 2.—IRREGULARITY, 2, 6, 10.—JUDGMENT, 4.—TESTATUM ACT, 2.

Service of declaration on attorney, who had not appeared—Costs.]—1. Where a declaration had been served on an attorney, who had not appeared, and no appearance was entered for the defendant at all, but the attorney did not deny that he was acting for the defendant, and the plaintiff afterwards signed interlocutory judgment—the court set aside the proceedings without costs, but stated that they would, on application, make the attorney pay them. *Dobie v. McFarlane*, ii. O. S. 285.

Appearance per Stat.—Time to file.]—2. Appearance according to the statute by the plaintiff for the defendant must be filed as of the term the writ is returnable, and cannot be entered later than the end of the vacation of the term after. *Forrester v. Graham*, ii. O. S. 369.

[See *Conday v. Moffat*, *infra*, 10.]

Appearance paper mislaid.]—3. Where defendant appeared by attorney, but the appearance paper was mislaid in the crown office, and the plaintiff entered an appearance according to the statute, and served a declaration on the defendant and proceeded to final judgment, the proceedings were set aside for irregularity. *Ryan et al. v. Leonard*, iii. O. S. 307.

[See also 7, *infra*.]

Interlocutory judgment—No appearance entered.]—4. Where no appearance had been entered, an interlocutory judgment was set aside after a year, the proceedings being void. *Lane v. McDonnell*, Hil. Term, 7 Wm. IV.

[Also, case 6, *infra*. *Roberts v. Spurr*, 3 Dowl. 551; *Watson v. Dow*, Id. 584. The case of *Williams v. Strahan*, 1 N. R. 309, would seem to be no longer law.]

No appearance, as a ground for setting aside interlocutory judgment.]—5. A defendant who has pleaded a plea which is a nullity, cannot object, as a ground for setting aside an interlocutory judgment signed after such plea, that there is no appearance

entered. *Brewster v. Davy*, Hil. Term, 2 Vic.

[See IRREGULARITY, 10.]

Proceedings void, if no appearance entered.]—6. If there be no appearance entered for the defendant, proceedings are void, and not merely irregular. *Nichol v. McKelvey*, Easter Term, 2 Vic.

Irregularity—Time for objection.]—7. When the defendant appeared by attorney, but the plaintiff having overlooked it entered an appearance for him according to the statute, and served the declaration on himself personally: *Held*, that after judgment by default, and notice of assessment served on him, he was too late to object to the irregularity. *Ketchum et al. v. Keefer*, Mich. Term. 3 Vic.

After appearance per stat., when plaintiff bound to notice defendant's attorney.]—8. When the plaintiff enters an appearance for the defendant according to the statute, he is not bound to take notice of any attorney for the defendant unless he plead. *Gourlay v. McLean*, Hil. Term, 3 Vic.

Appearance per stat. entered, without affidavit of service of writ.]—9. Where the plaintiff entered an appearance for the defendant without filing any affidavit of the service of the writ, the appearance was set aside for irregularity. *Courtney v. Bigelow et al.*, Hil. Term. 5 Vic., P. C., McLean, J.

[See waiver of such irregularity—WAIVER, 3.]

Time for filing appearance per stat.]—10. Appearance by the plaintiff for the defendant under the statute, must be filed before the end of the succeeding term, after process is returnable. *Conday v. Moffatt*, v. U. C. R. 450.

APPORTIONMENT OF RENT.

See COVENANT, II (1), 6.—RENT.

APPRAISEMENT.

See DISTRESS, II. 5.

APPRENTICE.

See MAGISTRATES, 9.

5 Eliz., ch. 4.]—1. An indenture of apprenticeship is not void, but voidable when contrary to the provisions of 5 Eliz., ch. 4: and *Seemle*, that statute is not in force in this province. *Fish v. Doyle*, Dra. Rep. 340.

Form of action against father.]—2. Articles of apprenticeship for less than seven years are not void under 5 Eliz., ch. 4, but voidable; and where a father and his son, a minor, entered into articles for the son's apprenticeship, and the son after remaining some time with his master, returned home by his father's orders, and refused to complete his apprenticeship; *Held*, that covenant against the father on the articles, and not case for enticing away, was the proper remedy. *Dellingham v. Wilson*, Easter Term, 3 Vic.

Covenant against father — Breaches — Plea — Leave and license — Sufficiency of plea.]—3. The plaintiff, in an action of covenant against the father of an apprentice, alleges as a breach that the apprentice unlawfully absented himself on a certain day, and from thence hitherto remained and continued absent from the service of the plaintiff. *Plea*, that the apprentice did depart and absent himself from the service of the plaintiff, by his leave and license: *Held* sufficient, without pleading a license to continue absent, as the plea only professed to answer the absenting himself from the plaintiff's service. *Held* also, that the plea need not shew that the license to be absent was given by deed or in writing. *Black v. Stevenson*, iii. U. C. R. 160.

APPROPRIATION OF PAYMENTS.

See PAYMENT, 1, 4, 9.

ARBITRATION AND AWARD.

I. REFERENCE AND BOND OF SUBMISSION.

II. ENLARGEMENT OF TIME FOR MAKING AWARD.

III. ARBITRATORS,

(1), *Power of.*(2), *Excess of Authority, Mistake, or Misconduct of.*

IV. AWARD,

(1), *Finality and Certainty.*(2), *Repugnancy or Mistake in.*(3), *Other matters relating to, and award generally.*

V. SETTING ASIDE AWARD, JUDGMENT OR VERDICT THEREON.

VI. ENFORCING AWARD,

(1), *By Attachment.*(2), *By Action—Pleadings and Evidence therein.*

VII. COSTS.

VIII. MISCELLANEOUS MATTERS.

I. REFERENCE AND BOND OF SUBMISSION.

See div. III(1), 3.—EXECUTOR ETC., III. 9.—SHERIFF, IV. 4.

When and by whom reference may be revoked.—1. A reference to arbitration by order of Nisi Prius, may be revoked by either party before award made. *Burrill v. Mills*, 1 & 2 Wm. IV.

Attachment—Breach of condition of reference.—2. The court will order an attachment to issue against a party who files a bill in equity, contrary to his undertaking in a rule of reference, and in disregard of a rule of court made thereon. *Manners v. Clarke*, i. U. C. R. 191.

Application to set aside writs of habeas corpus after attachment, refused.—3. Where a verdict was

taken in a cause at Nisi Prius subject to a reference, and the rule of reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity, and the defendant, against whom the award was made, did not make any motion in the court in the proper time, but filed his bill in equity, for which the court granted attachments against him and his solicitor, upon which attachments writs of habeas corpus were subsequently issued: the court refused to entertain a motion to set aside those writs, or suspend proceedings upon them. *Regina v. Maddock et al.*, i. U. C. R. 322.

Making submission a rule of court.]

—4. *Semble*, where parties executed articles of agreement to refer to arbitration, and the articles contained no clause to make the submission a rule of court, but by a subsequent instrument some months afterwards, such a clause was introduced: *Held*, that such a submission could not be made a rule of court under the statute. *Thirkell et al., In re.*, ii. U. C. R. 173.

5. The absence of a rule making the order of Nisi Prius a rule of court, should be shewn by something more than mere inference from the statement made in the affidavits filed. *Hawke v. Duggan*, v. U. C. R. 636.

Execution of bond by one of two partners.—6. One of two partners cannot execute an arbitration bond in the partnership name without the authority or consent of the other partner, so as to bind the other partner. *Baby v. Davenport*, iii. U. C. R. 54.

Bond, by husband and wife.—7. A bond of submission to an arbitration signed by the wife as well as the husband, is a valid bond. *McGill v. Proudfoot*, iv. U. C. R. 40.

Objections to bond by a person interested, that he is not a party thereto.—8. A. is substantially interested

in a lease; B. becomes security for A.'s performance of the covenants; D. and A. refer disputes connected with the lease to arbitration: *Held*, that it is no objection on the part of B. to the bond of submission, that B. is not a party thereto. *Ib.*

Submission that award shall be delivered on certain day—How performed.—9. Where the submission is that the award shall be *delivered* by a certain day, if it be *ready for delivery* by that day, it is sufficient. *Galbraith v. Walker*, Easter Term, 2 Vic.

Submission by Governor, under '9 Vic., ch. 37; and 10 & 11 Vic., ch. 24.—10. Under the statutes 9 Vic. ch. 37, sec. 24, and 10 & 11 Vic. ch. 24, sec. 3, a submission by the governor in council to arbitration is, in effect, a submission by the commissioner of public works. *Commissioners of Public Works v. Daly et al.*, vi. U. C. R. 33.

II. ENLARGEMENT OF TIME FOR MAKING AWARD.

See div. IV(1), 4.

Agreement, enlarging time—Rule of Court.—1. If a bond of submission contain a clause that the submission shall be made a rule of court, it is not necessary that an agreement enlarging the time should be made a rule of court as well as the submission. *Crooks v. Chisholm et al.*, iv. O. S. 121.

Enlargement of time under parol submission—Enforcing award.—2. Submission by bond, with a day limited to make an award, on which day the arbitrators, being then prepared with their award, but all parties believing the time limited would not expire until the following day, deferred the publication then at the request of the defendant, and heard further evidence on both sides on the following day, and then made their award: *Held*, that

the extension of the time was a parol submission, and that assumpsit was maintainable thereon for not performing the award, although no action could be brought on the bond. *Hall v. Alway*, Hil. Term, 6 Wm. IV.

By rule and consent.—3. Where a verdict was taken subject to a reference, and before the time limited for making the award expired it was enlarged by rule, and afterwards, by consent, again enlarged to a further time: *Held*, that the award was good under the last submission, although it would have been invalid if made under the rule, and the enlargement by consent might have been made a rule of court, as being part of the original reference. *Charles v. Hickson*, Trin. Term, 3 & 4 Vic. P. C. Macaulay, J.

Must be specified in rule of court on submission.—4. If the time for making an award has been enlarged by the arbitrators, such enlargement must be specified in the rule of court on the submission, on an application to set aside the award. *Thirkell et al.*, *In re.* ii. U. C. R. 173.

Power of Court to enlarge Time, although no power given to Arbitrators.—5. Where no power has been given by the rule of reference to enlarge the time for making an award, the court have, notwithstanding, under our statute, power to enlarge, in the exercise of their discretion, upon the affidavit and papers filed. *Jones et al. v. Russel*, v. U. C. R. 303.

When rule for, issues as of term generally, it relates back to first day thereof.—6. Where a rule issued as of Easter Term generally, to enlarge the time for making an award until the last day of the term: *Held*, the rule related back to the first day of term, and must be taken to extend the time mentioned in the original submission, and to operate as an admission that the time had not then expired. *Hawke v. Duggan*, v. U. C. R. 636.

Necessity of making enlargement a rule of court.—7. Where the time for making an award has been enlarged, the enlargement, as well as the original submission, must be made a rule of court. *Masecar v. Chambers et al.*, iv. U. C. R. 171.

Assent of both parties requisite.—8. Where a cause was referred by a rule of reference at Nisi Prius, and the rule of reference and an enlargement of the time for making the award, (which enlargement did not appear upon the face of it to have been assented to by both parties), were made rules of court—the court, upon an application for the non-performance of the award, refused the attachment, upon the ground that the enlargement of the time was not shewn to have received the mutual consent of both parties. *Ruthven v. Ruthven*, v. U. C. R. 273.

Setting aside enlargement of time indorsed on rule—Consent of parties to enlargement.—9. Where a cause was referred at Nisi Prius, and the rule of reference was made a rule of court, together with an enlargement of the time for making the award, which had been indorsed on the rule of reference; but there being no authority contained in the rule of reference to enlarge the time, and such enlargement not having been assented to *in writing* by both parties: *Held*, upon an application to set aside the rule, making the order of reference and the enlargement of time thereon indorsed a rule of court, and also the award founded upon such reference and indorsement, that—1st. The rule, so far as it made the rule of Nisi Prius a rule of court, could not be set aside. 2ndly. That that part of it making the enlargement of the time indorsed on the rule a rule of court, might be set aside. 3rdly. As in strictness both parties must be taken *verbally* to have assented to the enlargement of the time to the 23rd of November, when the award was made,

the award could not be set aside. *Ib.*, v. U. C. R. 276.

When award may be made.—10. An award may be made before the time to which the arbitrators had made an enlargement. *Tracey v. Hodgest*, vii. U. C. R. 5.

III. ARBITRATORS,

- (1) *Power of.*
- (2) *Excess of Authority, Mistake or Misconduct of.*

(1), *Power of.*

Respecting testimony offered.—1. Arbitrators refusing to give time to produce testimony, will not be allowed to support their award by shewing that such testimony could have been of no service. *Bull v. Bull, In re.*, vi. U. C. R. 357.

To cancel partnership agreement, and award prospective damages.—2. As to the power of arbitrators, under a very general submission, to cancel an existing partnership agreement, and award prospective damages to the partner losing by such cancellation. *See Crouse v. Parke*, vi. U. C. R. 362.

Legal intendment as to power.—3. Where the submission, with respect to some of the points to be settled, expressly states that the majority of the arbitrators shall have power to make an award, it will be intended by the court that this power, though not repeated throughout the submission, extends to all the matters in reference upon which the arbitrators cannot agree. *Thirkell v. Strachan*, iv. U. C. R. 136.

May direct notes to be given for sum awarded.—4. Arbitrators may order that promissory notes be given in satisfaction of the sum awarded. *Ib.*

On reference from Nisi Prius, may consider matters that could not be

raised at trial.—5. *Semble*, that upon a general reference at Nisi Prius, the arbitrators may, in making up their award as to the amount of the verdict, be governed upon their finding by matters in favor of defendant, which could not have been brought in question on a trial of the action. *Also*, that where the verdict is intended to be a final settlement between the parties, the arbitrators may take into consideration matters not embraced within the technical statement of the causes of action on the record, when advanced on the part of the plaintiff. *Watson v. Toronto Gas Company*, v. U. C. R. 523.

Power to award consequential damages under 9 Vic. ch. 37, and 10 & 11 Vic. ch. 24.—6. *Quære*: Have arbitrators the power, under 9 Vic. ch. 37, and 10 & 11 Vic. ch. 24, to award consequential damages, as for the loss of the carrying trade through the village of Milles Roches? *Commissioners of Public Works v. Daly*, vi. U. C. R. 33.

[No opinion of the court was rendered necessary upon this point, but see the opinion of the court thereupon.]

(2), *Excess of Authority, Mistake or Misconduct of.*

See div. VII. 3.

Verdict, subject to reduction by arbitrators—Costs.—1. Where a verdict was taken for 200*l.*, subject to be reduced by arbitrators, the costs to abide the event, and the award was for the defendant, it was set aside as being beyond the submission—the arbitrators being employed only to reduce the plaintiff's verdict, and the condition as to costs giving no authority by inference to deprive the plaintiff of them altogether, but applying only to the amount of costs to be eventually taxed. *Shaw v. Turton*, iv. O. S. 100.

Awarding costs when not empowered to do so under submission.—2. Where arbitrators awarded that costs

(over which the submission gave them no power) should be paid, and their amount could not be separated from the sum awarded, the award was set aside. *Watson v. Black*, Hil. Term, 4 Vic.

Examination of one of parties on oath, not being authorised to do so.—3. The award will be set aside, if arbitrators examine one of the parties upon oath, they not having been authorised to do so by submission. *Stocking v. Crooks*, Tay. U. C. R. 677.

Unfair conduct in hearing evidence.—4. An award was set aside on account of unfair conduct of the arbitrators in the manner of hearing the evidence. *Hamilton v. Wilson*, iv. O. S. 16.

Award by two arbitrators, third dissenting, in the absence of one of the parties.—5. Where, on a reference by A. and B., A.'s agent attended on his behalf, and after B. had given evidence to the amount of 200*l.*, retired, understanding from the arbitrators that the case was closed; and B., in his absence, induced two of the arbitrators to award him 1000*l.*, the third refusing to consent—the award was set aside on the payment of costs. *Van Egmond et al. v. Jones*, iv. O. S. 119.

Award not set aside, although arbitrators had mistaken the law.—6. Where all matters in difference in law and equity have been referred, and the award is legal on the face of it, it will not be set aside although it may seem that the arbitrators have mistaken the law, and the amount awarded is large; and the court will refer to papers delivered by the arbitrators simultaneously with the award, and intended to be explanatory of it, as a part of the award itself. *Hall v. Fergusson et al.*, Hil. Term, 6 Wm. IV.

Misconduct of arbitrators—Award set aside.—7. Where on a reference to arbitration, after the arbitrators had

commenced their investigation, both the plaintiff and his attorney requested delay, and understood that it had been granted, but the arbitrators made their award in favor of the defendant without giving further time, and without hearing all the testimony that the plaintiff might have offered—the award was set aside with costs. *Grisdale v. Boulton*, i. U. C. R. 407.

Refusal to examine witnesses.—8. Where one of the parties to a reference requires the arbitrators to examine witnesses, which they refuse to do, the award will be set aside, although it be shewn that before the submission was signed the arbitrators informed the parties that they would not allow either of them, or their attorneys or agents, to be present at their investigations. *McMullen et al., In re.*, ii. U. C. R. 175.

Dissolving partnership—Awarding on disputes arisen subsequent to submission.—9. Where arbitrators, being authorised to do so, dissolve a partnership, and in order to adjust the terms of the dissolution, award upon disputes that have arisen with respect to the partnership subsequent to the date of the submission: *Held*, that the award did not on that ground exceed the submission. *Thirkell v. Strachan*, iv. U. C. R. 136.

IV. AWARD,

- (1), *Finality and Certainty of.*
- (2), *Repugnancy or Mistake in.*
- (3), *Other Matters Relating to.*

(1), *Finality and Certainty of.*

Ordering party to pay all costs of suits final, without stating that suits should cease.—1. Where certain matters in difference between A. and B. were referred to arbitration, and also all costs of suits commenced or prosecuted by either party, whether

civil or criminal, and the arbitrators awarded that B. should pay a large sum to A., and also all costs of suits: *Held*, that the award was sufficiently final, without stating that the suits should cease, and that it could not be impeached, because damages had not been estimated by the arbitrators on some matters into which they should have inquired. *Ducat v. Green*, iv. O. S. 110.

Joint submission by several parties—Award final, without stating the amount each is to receive.—2. Where several parties make a joint submission of their claims, the award is final, though it does not distinguish the portion of money each one is to receive. *McGill v. Proudfoot*, iv. U. C. R. 40.

Disposal of verdict &c.—3. Where a verdict is taken for 1s. damages in a cause, subject to an award, and the arbitrators in their award do not in any manner dispose of the verdict or cause: *Held*, the award not final, and bad. *Beatty v. McIntosh et al.*, iv. U. C. R. 259.

Certain statements in award sufficiently certain.—4. Under the award and declaration, as given in the statement of this case,—the court held, that the amount of 500*l.* awarded to be paid by quarterly instalments, was stated with sufficient certainty; and also, that the thirty days' default in the payment of the 125*l.* falling due on the 10th of August, by which the plaintiff became entitled to claim the sum of 375*l.*, was sufficiently shewn in the plaintiff's declaration: also, that the appointment of the third arbitrator, and the extension of the time for making the award under the hands of the arbitrators without their seals, were valid acts according to the submission. *Watson v. Sutherland et al.*, i. U. C. R. 229.

Several issues—Disposal thereof.—5. Where in an action of assumpsit the defendant pleaded the general

issue and a set off, and a verdict was afterwards taken for the plaintiff, subject to a reference to arbitration, with leave to the arbitrators to enter a verdict for the defendant; and the arbitrators awarded, "that at the time of the commencement of the action, or at any time afterwards, the plaintiff had not any cause of action whatever against the defendant," and directed a verdict to be entered for the defendant for 20*l.* 10*s.* 1*d.* : *Held*, on motion to set aside the award, that both the issues were sufficiently disposed of. *Townsend v. Morton*, ii. U. C. R. 100.

6. Where a cause was referred to arbitration at Nisi Prius, under a rule of reference containing these words: "That the costs of the said cause shall be disposed of as follows—the costs on demurrer to be subject to the judgment of the court on the issues in law, upon which the arbitrators are to assess the damages sustained by the plaintiff, and the costs on the issues in fact, and the costs on the said reference shall be, in the discretion of the said arbitrators, &c.;" and the award said nothing respecting the issues in law, and no damages were assessed thereupon: *Held*, that under this submission, the award was good. *Masecar v. Chambers et al.*, iii. U. C. R. 186.

7. Where a cause, in which there are several issues joined, is referred to arbitration with costs to abide the event, and the arbitrators award a certain sum to the plaintiff, without saying anything about the issues, which are not necessarily from their nature determined by the award in favor of the plaintiff, the award cannot be supported. *Bernard v. Strachan*, ii. U. C. R. 128.

[The Court of Exchequer came to the same decision in *Rourke v. Lloyd*, x. M. & W. 550.]

Reference of a cause and all past and future demands—Award not distinguishing sum allowed in the cause

from that allowed for the other matters.]—8. The plaintiff sued the defendants in case for certain injuries, specifically set forth in the declaration as his cause of action. At the assizes the cause was referred to arbitration, and a verdict taken for the plaintiff for 1000*l.*, subject to be increased or diminished by the award. By the terms of the reference, the arbitrators had power "to take into consideration the various offers made by the defendants, and finally to settle and dispose of all the matters in difference, awarding as they should think fit, the payment of an entire sum in full satisfaction of all past and future demands, &c." Upon this submission the arbitrators declared, that having taken into consideration the matters and things which they were empowered by the submission to take into consideration, they awarded that the verdict for the plaintiff be increased to 1287*l.* 10*s.*, with costs to 46*l.* 10*s.*, and they concluded the award thus: "And the said sums so to be paid as aforesaid, &c., we do award, order, and determine to be, and the same are for all purposes to be taken in full satisfaction of all past and future demands of the plaintiff against the said defendants, for or in respect of the subject matter, or subject matters of the said cause, and all and every part thereof." The defendants moved to set aside the award upon the following grounds:—1st. Because the arbitrators, after hearing evidence (as stated in affidavits filed) of other injuries than those mentioned in the declaration, did not make their award "of all matters in difference," as submitted by the reference, but confined it to the subject matter issuing out of the cause of action in this suit. 2ndly. Because they did not distinguish in their award the sum allowed in the cause, from the sum allowed for the other matters in difference: *Held*, award good under the submission. *Watson v. Toronto Gas Company*, v. U. C. R. 523.

Award exceeding submission.—9. Where by a bond of submission it was recited, that A. B. agreed to give up his stock in trade to C. D., and to assign him all claims and debts due in respect thereof, on payment of such sums as arbitrators should decree; and the arbitrators appointed and awarded that C. D. should pay a certain sum, and also assure the payment and responsibility of debts due by A. B. on account of the said stock: *Held*, that the award was warranted by the submission and was good. *Fowke v. Lister*, Easter Term, 3 Vic.

Not disposing of verdict, &c.—10. Where it is the intention of the parties, by the submission of reference, to settle all matters finally between them, and for that purpose they give the arbitrators power to award upon the conveyance to be made between them, the amount of rent to be paid, and the security to be taken therefor: *Held*, that an award directing "all necessary deeds for granting, &c., and for securing payment of the rent to be executed," without saying what kind of conveyances, &c., is bad. *Beatty v. McIntosh et al.*, iv. U. C. R. 259.

(2), Repugnancy or Mistake in.

Repugnancy.—1. An award that the defendant should pay the plaintiff a certain sum, including the costs of the reference, and afterwards directing that each party should pay half the same costs, is bad for repugnancy. *Shaver v. Scott*, Trin. Term, 7 Wm. IV.

Mistake in initial letter of one of the parties' names—Award for a certain sum, ordering a verdict for a larger sum.—2. *Held*, that a mistake in the initial letters of the name of one of the parties does not invalidate an award; and that an award for a certain sum, and that a verdict should be entered for *the said sum*, naming a larger sum, is good for the smaller one.

Charles v. Hickson, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

[See a case of misnomer, 4 *infra*.]

Discovery of mistake in first award, and execution of second—Second bad.—

3. After an award had been made, the arbitrators discovered that they had made a mistake in the amount awarded, destroyed their award and executed another—the court set the second award aside. *Benson v. Love*, i. U. C. R. 398.

Mistake in styling and naming parties.—4. Where a verdict was taken for the plaintiff, subject to a reference to arbitration, and the arbitrator made his award in favor of the defendant; but in it, everywhere styled the plaintiff's christian name "John," instead of "Patrick,"—the court set the award aside and granted a new trial. *McManmon v. McElderry*, Hil. Term, 6 Vic.

Mistake in calculating interest.—5. A mistake in the calculation of interest was held not to be a sufficient ground to set aside an award. *Priestman v. McDougall*, Tay. U. C. R. 622.

(3), Other Matters Relating to.

See divs. II. 3; VII. 1.

Concerning mill-dam.—1. Where arbitrators, to whom disputes, arising from the overflowing of three acres of the plaintiff's land by water thrown back by the defendant's mill, were referred, awarded damages to the plaintiff for the injury, and that the defendants should have a full fall of nine feet, and no more, for their mill-dam, provided that the water on the plaintiff's land was not raised thereby, and the defendants raised their dam to nine feet, and overflowed five acres more of the plaintiff's land: *Held*, that the award did not prevent his recovery of compensation for such further injury, and that he was entitled to damages for

the loss of the additional five acres. *Casler v. Ransom et al.*, Trin. Term 7 Wm. IV.

Construction of award.]—2. Where by the terms of an award, made between the plaintiff and the defendant, in consequence of differences which had arisen about the defendant's going on the plaintiff's land to embank a stream on which the defendant had a mill, the defendant was directed to pay to the plaintiff 10*l.* a year, so long as he should hold, occupy, use and enjoy, for his own use and benefit, the premises on which he had such occasion to go—it was held, that the payment was to be made every year, as long as the defendant's interest in the premises continued, although he might not have occasion to go on the plaintiff's land. *Pickle v. Perrin*, i. U. C. R. 387.

Award of different matters at different times, under the same submission, within a specified period.]—3. Where in debt on bond, conditioned for the performance of an award, on a submission of all matters in difference, the defendant pleaded no award, and the plaintiff replied, setting out an award on one subject matter, for the payment by the defendant of a certain sum of money to the plaintiff, and averred that the parties had agreed to withdraw all but that subject matter from the consideration of the arbitrators, and to settle the other matters in difference themselves; but if they could not settle the other matters, then to refer them back to the arbitrators, who, within the time for making their award under the submission, awarded on the other matters in difference in favor of the plaintiff also, and then set out as a breach the non-payment of the money under the award, to which the defendant demurred specially—the court held the first award clearly good; and *semble*, that the second was good also. *Baby v. Davenport*, ii. U. C. R. 65.

Interest.]—4. Where an award fixes no day for the payment of money, a party suing for the sum awarded, is not, as a matter of right, entitled to interest. *Bentley v. West*, iv. U. C. R. 98.

Award respecting real property—Ejectment.]—5. An award made upon a question respecting real property, *expressly referred*, is binding upon the parties, so far as respects the right of either to bring an ejectment against the other, or to defend himself against an ejectment. *Doe dem. McDonald v. Long*, iv. U. C. R. 146.

[See also case 9, *infra*.]

Awards under 9 Vic. ch. 37, and 10 & 11 Vic. ch. 24.]—6. In dealing with awards made under the provincial acts 9 Vic. ch. 37, sec. 24, and 10 & 11 Vic. ch. 24, sec. 3, the court will be governed by the ordinary rules of law as applicable to awards made between party and party. *Commissioners of Public Works v. Daly et al.*, vi. U. C. R. 83.

Consequential or direct damages.]—7. The award made by the arbitrators appointed under the acts mentioned in the above cause stated that they awarded that the Commissioners of Public Works should pay to A. the sum of, &c., “for the damage done to his property in the village of Milles Roches, by the construction of the Cornwall Canal.” No further particulars of damage were stated in the award. Affidavits however were filed by the engineers of the public works, to shew that in their belief the sum awarded must have been given, from its amount, for consequential, and not direct damage, such as the commissioners contended the arbitrators could alone award upon. But, *held per Cur.*, that the affidavits nowhere stated in positive terms that the commissioners had allowed for consequential damages; and the award being silent on the subject, as it might be, the court could

not assume the fact to be so, and upon that ground (if a valid one) set aside the award. *Ib.*

Verdict or an award, specifying the amount of damages against one of two joint trespassers, whether paid or not, a bar against the other—Secus—Action of debt.]—8. A verdict or an award, specifying the amount of damages against one of two joint trespassers, is in itself a bar, whether paid or not, and has the same effect as a satisfaction by him would have had, in precluding any action against his cotrespasser; it is therefore unnecessary in the plea to an action of trespass, setting out the award of the damages, to aver that the sum awarded has been paid. It would be different, however, in pleading an award to an action of debt, in which two are jointly bound: there, unless payment of the award be averred, it is no bar. *Adams v. Ham*, v. U. C. R. 292.

Award respecting real property, an estoppel to parties concerned.]—9. A plaintiff in ejectment, who, before action, has submitted the question of the possession of the premises to arbitration, is estopped by an award in favor of the defendant. *Doe dem. Galbraith v. Walker*, Easter Term, 2 Vic.

V. SETTING ASIDE AWARD, JUDGMENT, OR VERDICT THEREON.

See divs. II. 4, 9; III (2), passim; IV (2), 3, 4, supra; VI (1), 7; VII. 3; VIII. 7 infra.

General principle.]—1. The court will not intend matter for the purpose of setting aside an award; such matter must be shewn affirmatively. *Tracey v. Hodgest*, vii. U. C. R. 5.

Setting aside award, when original not produced.]—2. Where on an application to set aside an award, it was sworn that the original was in the possession of the plaintiff's attorney, who

refused to give it up—a rule nisi was granted, which was afterwards made absolute, on the production and verification of the copy of the award served. *Steen v. Glass*, Mich. Term, 1 Vic.

Notice to produce evidence—Insufficiency of time.]—3. On a reference to arbitration, after the arbitrators and umpire had heard the plaintiff's witnesses, the defendants refused to give their evidence, and the arbitrators appointed by them would not concur in the award. The umpire, in consequence, gave notice to the defendants to produce their witnesses, but the time which he gave for their production was so short that the defendants could not bring them before him, and he made his award on the evidence which he had already heard. The court held, that the notice to the defendants did not give them sufficient time, and therefore set the award aside. *Proudfoot v. Trotter et al.*, Trin. Term, 4 & 5 Vic.

Form of rule to set aside award.]—4. The court discharged a rule for setting aside an award—first, because it was not stated that the rule was drawn up on "*reading the award*;" and secondly, because the alleged defects in the award were not sufficiently pointed out. *Grand River Navigation Company v. McDougall et al.*, i. U. C. R. 255.

[See 13 and 14, infra.]

Miscarriage of notice.]—5. Where the plaintiff's attorney had attended a meeting of arbitrators, and they made their award—the court refused to set aside the same upon the ground that the plaintiff had not attended to give his evidence agreeably to the provision in the rule of reference, from the miscarriage of a notice sent to him by his attorney for that purpose, and although the decision of the arbitrators proceeded principally upon the evidence of the defendant. *M'Dougal v. Camp*, Tay. U. C. R. 108.

When either party unfairly treated.]—6. Although the court are bound not to set aside an award on the *merits*, yet they will interfere when they see that either party has not had an opportunity of explaining or examining into the whole matter submitted. *Small v. Rogers*, Hil. Term, 4 Vic.

Motion.]—7. Whenever a certain fact is relied on to set aside an award, that fact must be distinctly sworn to, and if denied, the denial is conclusive. *Slack v. McEathron*, iii. U. C. R. 184.

Setting aside, on affidavit of merits.]—8. The court will not set aside an award upon an affidavit of merits, except upon manifestly clear and strong grounds. *Scobell v. Gilmour*, v. U. C. R. 48.

Statute 9 Vic. ch. 37, and 10 & 11 Vic. ch. 24.]—9. The time given by the statute within which to move to set aside awards under these acts—viz., one year—extends to Upper as well as Lower Canada. *Commissioners of Public Works v. Daly et al.*, vi. U. C. R. 33.

When court will not interfere to set aside award.]—10. Where there is no provision in an order of reference at Nisi Prius to make it a rule of court—the court will not set aside the award. *Cumming v. Allen*, Tay. U. C. R. 369.

Arbitrators not wishing award to be delivered till costs of it be paid.]—11. The court refused to set aside an award on the ground that the arbitrators had desired it not to be delivered until the costs for making it were paid, *Gee v. Attwood*, Tay. U. C. R. 150.

Refusal to set aside judgment on award, two terms having elapsed.]—12. Where in trespass to personal property, and several pleas pleaded, a verdict was taken for the plaintiff by consent, subject to be reduced and a verdict entered for the defendant by the award of the arbitrators, and the arbitrators made their award determin-

ing the cause in favour of the plaintiff, and that the verdict should be reduced to 7*l.* 10*s.*—the court, after a lapse of two terms, refused to set aside the judgment on the award on the ground that the award was void, as it did not dispose of the issues in the cause; and also held, that the application was made too late. *Wood v. Moodie et al.* iii. U. C. R. 79.

Necessary statement in rule nisi, for setting aside award]—13. In the rule nisi for setting aside an award it must be stated that the rule is drawn up “on reading the award or copy of it.” The omission of these words is fatal. *Wilkins v. Peck*, iv. U. C. R. 263.

Objection to rule nisi for setting aside, how answered]—14. The objection to the rule nisi for setting aside the award that it is not drawn up “on reading the award,” is well answered by shewing that among “the affidavits and papers filed,” on reading which the rule was drawn up, there was a copy of the award verified by affidavit. *Tracey v. Hodgest*, vii. U. C. R. 5.

Verdict.]—15. Where a party obtains a verdict upon an award, the court, upon a motion against the verdict, will go into the *merits* of the award. *Thirkell v. Strachan*, iv. U. C. R. 136.

VI. ENFORCING AWARD.

(1), *By Attachment.*

(2), *By Action—Pleadings and Evidence therein.*

(1.) *By Attachment.*

See ESCAPE, 11, 12, 13, 14, 15.—PRACTICE, II. 39, 42.

Service of Papers.]—1. In order to bring a party into contempt for not paying money pursuant to an award, the original rule and other papers should be shewn at the same time as

the copies are served. *Kent v. Sumner*, Trin. Term, 11 Geo. IV.

[*Semble*: That personal service, even of a rule for an attachment, may be dispensed with when there is *no other remedy*, *In re Whaley*, xiv. M. & W. 731. *Contra*: *Wilkinson v. Pennington*, 6 Dow. P. C. 183, in the Common Pleas.]

Motion for.—2. In moving for an attachment for non-payment of money, pursuant to an award, it must appear distinctly by the affidavit that the demand was not made too soon. *Baines v. McMartin*, Easter Term, 6 Wm. IV.

3. Where an attachment is moved for the non-performance of an award made by an umpire, it must be shewn how the umpire was appointed, and his appointment must be in writing. *Carpenter v. Vanderlip*, Easter Term, 3 Vic.

Rule not absolute in first instance.—4. The court will not, upon a first motion, grant a rule absolute for an attachment, for non-performance of an award, although the party consents by his counsel. *Stewart v. Crawford*, Tay. U. C. R. 564.

Affidavit for.—5. An affidavit for an attachment on an award, is bad, in not denying payment of *any part* of the sum demanded. *Masecar v. Chambers et al.*, iv. U. C. R. 171.

Against executors.—6. Where in an action against executors, they submitted to arbitration, with a proviso in the submission that the submission should not be taken as an admission of assets, and the arbitrators awarded that they should pay a certain sum, without stating that they had *assets*—a rule for an attachment against them for non-payment, was refused. *Gilbert v. Simpson et al.*, Mich. Term, 7 Vic., P. C. Jones, J.

Attachment refused for non-performance of an award made in favor of a person in his representative character, affidavits shewing that it was

in his own right.—7. Where a plaintiff, having two actions pending, one in a representative character and the other in his own right, referred both to arbitrators, who were to make their award by a certain day, or appoint an umpire in writing, and the arbitrators not being able to agree, appointed, but not by writing, an umpire, who made an award, which the arbitrators adopted and published as their own before the time limited for making the award had expired, and awarded thereby a sum of money to the plaintiff, in his *representative* character—the court, on affidavits of the umpire and of the arbitrators, that the money was intended for the plaintiff in his *own right*, refused to grant an attachment for non-payment of the sum awarded, and afterwards on motion set the award aside. *Dennison v. Sandford*, iii. O. S. 379.

(2), *By Action—Pleadings and Evidence therein.*

See divs. II. 2; IV(3), 3. *supra*.—PLEADING, III. 2; V. 4.—VARIANCE, 2.—VENUE, 1.

Form of action.—1. Where a plaintiff has been awarded a certain sum of money, in accordance with the terms of an instrument under seal, for the non-payment of such award, the plaintiff should sue in covenant; he cannot sue in assumpsit, unless some new consideration apart from the written instrument can be proved. The fact that the valuation took place on a day later than at first agreed upon in the written instrument, makes no difference in the form of action that should be brought. *Tait et al. v. Atkinson*, iii. U. C. R. 152.

Debt on award—Concurrent acts.—2. In debt on award that the defendant should pay to the plaintiff 149*l.* on a day mentioned, and that the plaintiff should deliver up a house in his possession to the defendant on the

same day: *Held*, that these were concurrent acts, and that the plaintiff must aver a *readiness* to perform his part. *Baker v. Booth*, Dra. Rep. 68.

Action—Plea—Replication.—3. If it be awarded, as in the last case, that one party shall pay money, and the other shall deliver up premises on a certain day, in an action for the money it is sufficient to aver *readiness* to deliver up the premises, and vice versa; and where to a plea that the defendant demanded the award from the arbitrator on the 5th of February, the plaintiff replied a publication and notice of the award on the 6th, (the day when the award was to be made), the replication was held good. *Baker v. Booth*, ii. O. S. 373.

Sufficiency of breach in a declaration on an award.—4. A breach in a declaration for the payment of money on or before a certain day, that the money was not paid on that day, is sufficient on general demurrer, and it is not necessary to aver notice of an award. *Turner v. Alway*, Hil. Term, 6 Wm. IV.

Debt on bond—Conclusion of plea setting forth legal grounds of objection—Assignment of two breaches in replication.—5. In debt on bond, conditioned to perform an award, a plea, setting forth mere legal grounds of objection and concluding to the country, is bad; and if there be two separate parts in the award, matter which only answers one part cannot be pleaded in bar of both; and if two breaches be assigned in the replication, it will be sufficient on general demurrer if one only be supported. *Boyd et al. v. Durand*, Easter Term, 6 Wm. IV.

Declaration averring award made on day appointed—Plea, no award—Replication varying from declaration as to time.—6. Where to a declaration in debt on a submission bond, with an averment that the award was made on

the day appointed, the defendant pleaded "no award," and the plaintiff replied an award within the time—to wit, on a day and year different from the year stated in the declaration—the replication was held sufficient on general, though it would have been bad on special demurrer. *Judge v. Judge* Mich. Term, 2 Vic.

Declaration by Kingston Bank Commissioners, under 10 Geo. IV. ch. 7, on an award—Insufficiency of breach.—7. Where in debt on an award made in favor of the Kingston Bank Commissioners, under the 10 Geo. IV. ch. 7, the plaintiffs in their declaration set out an award that the defendant should pay 900*l.* in *bills or notes* of the bank, or bank certificates, or orders for stock by a certain day; and assigned as a breach that the defendant had not paid in the terms of the award, but did not negative payment in *money*: the declaration was held bad on general demurrer. *Kingston Bank Commissioners v. Dalton*, Easter Term, 3 Vic.

Husband and wife—Alimony—Pleadings.—8. Where in an action on a bond for the performance of an award, a count set out the intention of the plaintiff's daughter and her husband, the defendant, to live separate; that it was submitted to arbitrators to settle the amount of an allowance to be paid to her in lieu of alimony, &c.. upon the plaintiff entering into such security as should be deemed proper to indemnify her husband, &c., and the plaintiff should, when the award was made known, enter into such security; that the condition of the bond was to pay the defendant's wife what should be awarded, upon the plaintiff entering into such security, assigning for breach that the award had fixed the amount at 50*l.*, payable quarterly thenceforward, commencing from the day of her departure from her husband (a day in point of fact antecedent to the submission), averring that the plaintiff did afterwards, by his

deed, &c., covenant to indemnify, &c.; that although the plaintiff afterwards tendered the said covenant, and exhibited the bond and award (without any profert of the covenant), and demanded the sum—to wit, 62*l.* 10*s.*—being one year and one quarter from 6th September 1822, being the day of the separation, &c., due on the award—refusal of payment—the count was held good upon special demurrer, objecting to it as inconclusive, having a retrospect not warranted, and wanting profert of the covenant.

A second count, omitting the statement of notice of the award and a request to pay, also held good.

A third count, assigning for breach that the plaintiff offered to enter into any security that might be deemed proper to indemnify, &c., yet that the defendant refused *to accept anything at all therein* (without stating a tender of covenant), also held sufficient, upon the ground that the defendant's *refusal to accept anything at all* discharged the plaintiff from making such tender. *Beasley v. Stegman*, Tay. U. C. R. 685.

Covenant — Plea, that defendant offered security by bond, omitting to make profert.] — 9. Where in covenant for not performing an award, the plaintiff set out a submission and the covenant of the parties, that he against whom the award should be made should find security for payment of the sum awarded, and the plaintiff then averred that an award was made against the defendant, who had neither secured nor paid the money, and the defendant pleaded that he had offered security by bond which the plaintiff refused, but omitted to make profert of the bond,—the plea was held bad on special demurrer, for the omission. *O'Grady v. McDonell*, Easter Term, 4 Vic.

Proof, upon the plea of non est factum.] — 10. It seems sufficient in an action upon a bond conditioned for

the performance of an award upon the plea of non est factum and subsequent suggestion of breaches by the plaintiff, to prove the bond and submission set out upon the record and an award tallying with it; and if the defendant propose to object to matter apparent upon the face of the record, he should pray oyer and demur. *Lossing v. Horned*, Tay. U. C. R. 291.

Proof of submission.] — 11. In a declaration in debt on an award under bonds of submission, it is necessary to shew a mutual submission and to prove the bonds executed by all the parties; but where the defendant in the course of the trial of the cause allowed a credit to be given to him without objection for money paid on the award, it was held that he could not afterwards urge as a ground of nonsuit that the plaintiff had not proved his own execution of the bond of submission. *Skinner v. Holcomb*, Easter Term, 5 Vic.

Debt—Seven pleas objecting to validity of award.] — 12. To an action of debt on a bond for the non-performance of an award the defendant pleaded seven different pleas (set out in the report), raising various objections to the validity of the award: the court held, upon demurrer, all the pleas bad. *Tinkle v. Arnold*, vi. U. C. R. 168.

Plea of no award—Insufficiency of.] — 13. In debt on a submission bond, conditioned to abide by the award of certain arbitrators named, or an umpire indifferently chosen between the parties, a plea that the arbitrators did not make any award, nor did any umpire “duly” appointed make any award according to the condition, was held bad on special demurrer. *Croker v. Hoggan*, Easter Term, 7 Vic.

[The plea of “no award” means no valid award. *Dresser v. Stansfield*, xiv. M. & W. 822.]

Award to be made in writing—Plea, that arbitrators did not make award in writing under their hands.]

—14. In debt on a bond conditioned to perform the award of arbitrators *in writing*, a plea that they did not make any award *in writing under their hands*, was held bad on special demurrer. *Baby v. Davenport*, Hil. Term, 7 Vic.

Pleading set-off to action on submission bond.]—15. A set-off of a sum certain may be pleaded to a declaration in debt on a submission bond assigning as a breach the non-payment of a sum certain awarded to the plaintiff. *Linford v. Musgrove*, Hil. Term, 7 Vic.

Pleadings—Mistake in name of arbitrator.]—16. The effect of a repugnancy in a replication, setting out an award to the submission set out on over, as regards the name of the arbitrator. See *Tewesley v. Dunlop et al.*, i. U. C. R. 138.

Plea of performance, replication denying it only by inference.]—17. Where to debt on an arbitration bond, the defendant pleaded performance, and the plaintiff replied, setting out the award, which was for payment by the defendant of a debt due to A. B. by the plaintiff and the defendant as copartners, that the plaintiff was forced and obliged to pay the debt due to A. B., but did not shew otherwise than by inference that it had not been paid by the defendant, the replication was held bad on special demurrer. *Lymburner v. Norton*, i. U. C. R. 485.

Averments, when by submission the award is not directed to be made and delivered within a certain time]

18. Where the submission does not require the award to be made and ready to be delivered within a certain time, it is not necessary to aver that the award was made within a *reasonable* time; neither is it necessary to aver notice of the award to the plaintiff. *Adams v. Ham*, v. U. C. R. 292.

Grounds for nonsuit.]—19. A variance in the names of arbitrators as stated in the declaration, the agreement and award, is no ground of nonsuit. *Bentley v. West*, iv. U. C. R. 98.

Withdrawal of some of the matters submitted—Submission by parol.]—20. Where in debt on a bond, the plaintiff declared, reciting a submission by bond, and that under the bond the arbitrators had made an award upon one of the matters in difference, the other matters having been by consent of the parties withdrawn from their consideration, and that afterwards the other matters having been again submitted, the arbitrators made an award in favor of the plaintiff, and the defendant pleaded “no such submission” and “never indebted,” and at the trial the plaintiff proved the parol submission but did not produce the bond, and the point was reserved for the defendant to move upon that objection—the court, on motion for a new trial (the verdict being in accordance with the justice of the case), refused to interfere. *Baby v. Davenport*, iii. U. C. R. 13.

VII. Costs.

See Costs, I(1), 5, 6.

Costs, how recoverable.] 1. Where a cause was referred to arbitration, costs to abide the event, and the arbitrators having made no award the parties agreed to refer the cause to any judge of the district court who should first come to Perth; and a district court judge having come there, heard the evidence, and awarded that the plaintiff in that cause had no cause of action, and that judgment should be entered for the defendant: *Held*, that the award was good, and that the defendant might maintain assumpsit for the taxed costs of the cause, and was not obliged to enter judgment. *Hale v. Mathison*, iii. O. S. 78.

Costs for delay.]—2. Where, owing to the misconduct of a party to a reference, arbitrators do not make an award, but an award is made by an umpire, costs will not be granted to the other party on a summary application under the clause in the rule of reference, "that if either party shall by affected delay or otherwise wilfully prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the court shall think reasonable and just." *Proudfoot v. Trotter et al.*, i. U. C. R. 398.

Costs on setting aside award.]—3. Where an award is set aside for irregular proceedings on the part of the arbitrators, such as the examination of witnesses in the absence of the parties, it will be set aside without costs. *Campbell v. Boulton*, Mich. Term. 6 Vic. P. C. Jones J.

VIII. MISCELLANEOUS MATTERS.

See COSTS, IV(1), *passim*.—JUDGMENT, 21, et seq.—TRESPASS, II. 32.—WAIVER, 5.

Notice of time of sitting of arbitrators.]—1. Where a cause has been referred by the court to arbitration, notice of the time of the sitting of the arbitrators must be given to the attorney in the cause. *Allan v. Brown*, Tay. U. C. R. 460.

Time to raise objections to award.] 2. It is too late to object to an award after a lapse of four terms from the publication and an attachment granted for non-performance. *Crooks v. Chisholm et al.*, Hil. Term, 5 Wm. IV.

[Proper time to move against, see case numbered 5, *infra*.

Award made in course of a cause—Stay of proceedings.]—3. An award made in the course of a cause does not operate as a stay of proceedings; and if the plaintiff proceed and the defendant rely upon the award, he must

plead *puis darrein continuance*. *Fido v. Wood*, Easter Term, 2 Vic.

Court will not inquire into grounds on which award made.]—4. The court will not inquire into the grounds on which an award has been made, even although it be suggested that the arbitrators have opened a final judgment of a competent court under a submission in the common form, if it does not clearly appear that they have opened the judgment or gone into its merits. *McLevy v. Vandecar*, Easter Term, 7 Vic.

Time for moving against award after verdict.]—5. Where a verdict has been taken, subject to a reference to arbitration, the court will not, unless under very peculiar circumstances, allow the award to be moved against on a day subsequent to the first four days of the term after it was made. *Campbell et al. v. Cameron*, i. U. C. R. 20.

Submission of all causes of action—Subsequent action—Material issue.] 6. Where the plaintiff and the defendant submit to arbitration all causes of action, and an award is given, and the plaintiff afterwards sues the defendant for a cause of action not brought before the arbitrators, upon the ground that at the time of the submission the plaintiff had no knowledge of its having accrued, an issue tendered as to the fact of such knowledge is material. *Lusty v. Van Volkenburgh*, i. U. C. R. 214.

Interested witness—Effect on award.]—7. When arbitrators admit the testimony of a witness who has a distinct interest in the matters in dispute, and afterwards award in favor of the party in whose behalf the witness was examined, the submission to arbitration containing no consent to the examination of the parties interested, the award will be set aside. *Davis v. Birdsall, et al.* ii. U. C. R. 199.

Calling in umpire—Adopting his opinion—Award.]—8. Where arbitra-

tors disagree in some of the items of the account referred to them, and during the investigation call in an umpire to give his opinion on such items, and subsequently adopt that opinion as their own, it is not necessary that the umpire should sign the award. *Cayley et al. In re*, iii. U. C. R. 124.

Attorney appointed to receive money under award—Power to substitute another.]—9. Where money by the award is to be paid to the plaintiff or to the plaintiff's attorney, the attorney cannot substitute another attorney under him to receive the money. *Masecar v. Chambers et al.* iv. U. C. R. 171.

Affidavit of execution of award.]—10. The affidavit proving an award must shew that it was executed within the time limited by the submission.—*Heather v. Wardman*, iv. U. C. R. 173.

ARGUMENTATIVENESS IN PLEADING.

See PLEADING, I.

ARMY.

See SECURITY FOR COSTS, 5.

Action against colonel of a regiment—Question for jury.]—1. In an action by a contractor against the colonel of a regiment for clothes made for his men, it should be left to the jury whether the credit was given to the government or the defendant. *McElderry v. Baldwin*, Mich. Term, 3 Vic.

Action by an officer against the paymaster for his pay.]—2. An action cannot be maintained by an officer against the paymaster of his regiment for the amount of his pay, where the paymaster is directed not to pay it over by the commanding officer. *Elliot v. Hall*, Hil. Term, 2 Vic.

Liability of officers for debts contracted by messman.]—3. The officers of a regimental mess are not liable for debts contracted by their messman without their authority. *Sutherland et al. v. Sparke et al.*, Hil. Term, 4 Vic.

ARREST.

See CAPIAS AD RESPONDENDUM.—
CAPIAS AD SATISFACIENDUM.—
MALICIOUS ARREST.

- I. AFFIDAVIT TO HOLD TO BAIL.
- II. PRIVILEGE AND DISCHARGE FROM.
- III. SECOND ARREST, AND ARREST ON ALIAS WRITS.
- IV. OTHER MATTERS.

I. AFFIDAVIT TO HOLD TO BAIL.

See CONSTABLE, 3, 5.—ESCAPE, 10.
MALICIOUS ARREST, 2, 3, 4.

Insufficiency of, where debt is on bond.]—1. An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff upon a certain bond or obligation," is insufficient. *Prior v. Nelson*, Tay. Rep. 230.

[See *Case v. McVeigh*, infra 28.]

For use and occupation.]—2. An affidavit stating "that the defendant was indebted to the plaintiff in the sum of 50*l.* for the use and occupation of a certain tenement," held sufficient. *Ferguson v. Murphy*, Tay. U. C. R. 271.

Deponent's name not set forth at length.]—3. The court set aside an arrest, the affidavit to hold to bail not setting forth the deponent's name in words at length. *Richardson v. Northrope*, Tay. U. C. R. 452.

[See *Westover v. Burnham*, infra 29.]

Affidavit on special case—Using words of the statute.]—4. Where a

person had been arrested under a judge's order, the court did not consider it necessary to make use of the precise words pointed out by the statute. *Bardon v. Cawdell*, Tay. U. C. R. 669.

5. The affidavit to arrest on special case requiring the sanction of a judge to the issuing of the writ, need not follow the form prescribed by the act, that form of affidavit being only considered necessary in matters of debt, when the creditor may sue out the *capias* as of right. *Neven v. Butchart*, vi. U. C. R. 196.

On a promissory note.—6. An affidavit to hold to bail upon a promissory note must state it to be "payable." *Smith v. Sullivan*, Tay. U. C. R. 778.

[Upheld in *Andruss v. Ritchie*, infra 8. Also, see cases, 22, 33, 43 infra.]

What words do not satisfy the statute.—7. In an affidavit to hold to bail, the statute is not satisfied by the words "that the plaintiff had reason to believe that the defendant was about to depart this province without paying, &c." *Choate v. Stevens*, Tay. U. C. R. 620.

On promissory note—Word "payable" omitted.—8. The word "payable" being omitted in an affidavit to hold to bail on a promissory note, the arrest was set aside. *Andruss v. Ritchie*, Dra. Rep., 5.

Conclusion.—9. An affidavit of debt, concluding "that the defendant will leave the province of Canada," is sufficient. *Brown et al. v. Parr*, ii. U. C. R. 98.

10. The conclusion of the affidavit of debt negating any vexatious or malicious motive required by the stat. 2 Geo. IV. ch. 1, sec. 8, is not necessary since the statute 8 Vic. ch. 48, sec. 44. *Lee et al. v. McClure*, iii. U. C. R. 39.

[See case 21, infra.]

For goods sold and delivered—Statement of request.—11. An affidavit for

goods sold and delivered must shew the request of the defendant, and the request being laid to other sums will not supply the defect. *Watkins et al., v. Liebshitz*, Hil. Term, 7 Wm. IV.

[Overruled by the next case.]

12. In an affidavit to hold the defendant to bail, for goods sold and delivered by the plaintiff to the defendant, it is not necessary to state that such goods were sold at the defendant's request. *Ogilvie et al., v. Kelly*, iv. U. C. R. 393, P. C. McLean, J.

For money paid.—13. *Semble*: That the request must be stated in action for money paid. *Ib.*

For money lent.—14. *Semble*: That the request need not be stated in an action for money lent. *Ib.*

For goods sold.—15. It must be shewn that the goods were sold and delivered by the plaintiff to the defendant. *McDonnell v. Kelly*, iv. U. C. R. 394.

[For work and labor, see *Hall v. Brush*, infra 31.]

For a trespass.—16. In trespass de bonis asportatis, an affidavit that the defendant "took possession of the plaintiff's goods, and still keeps possession of them," is sufficient to warrant an order to bail. *Ingraham v. Cunningham*, Dra. Rep. 116.

Misnomer in affidavit and writ.—17. An arrest was set aside, where the defendant, whose name was "Patrick," was called "Peter" in the affidavit and writ. *Botsford v. Stewart*, Easter Term, 11 Geo. IV.

Affidavit stating debt owing from partners—One only arrested.—18. Where the affidavit stated that two persons, trading under the name of "J. & Co.," were indebted to the plaintiff, and process issued against one only, the other being within the jurisdiction, the arrest was set aside. *Chisholm v. Ward et al.*, Dra. Rep. 490.

Irregularly made.—19. Where an affidavit to hold to bail was made

while the defendant was in the United States, and was left in this province in readiness in case he should come over—the court set the arrest aside. *Cozens v. Ritchie*, Dra. Rep. 176.

[See a case of one foreigner being arrested by another during a short stay here, *Raynor v. Hamilton*, division iv., case 2, of this title.]

Statement of amount, when debt arising from several demands.—20. It is not necessary in an affidavit of debt for money lent, paid, and on an account stated, to state the sum due on each account. *Tannahill v. Mosier*, ii. O. S. 449.

[Also, *Black v. Adams*, infra 25, *McKenzie v. Reid*, infra 34.]

Conclusion of.—21. The conclusion in an affidavit of debt, “that the deponent does not make the affidavit, &c., from any vexatious or malicious motive,” is unnecessary, where an order is obtained for an arrest. *McLaughlin v. Wismer*, Mich. Term, 7 Wm. IV.

[See further, *Wiltsee v. Bloor*, infra 23.]

Against indorser of note or drawer of bill.—22. An affidavit of debt against the indorser of a promissory note or drawer of a bill of exchange must state the default of the maker or acceptor. *Ross et al. v. Balfour et al.*, Mich. Term, 2 Vic.

[*Crosby v. Clarke*, i. M. & W. 296, agrees with this decision. See cases cited in note to *Crosby v. Clarke*, M. & W. index 61.]

Necessity of ordinary conclusion.—23. Where an application is made for an order to arrest, the affidavit must contain the ordinary conclusion, that the deponent is apprehensive of the defendant's departure from this province. *Wiltsee v. Bloor*, Easter Term, 2 Vic.

Title of, “in District Court,” for “Queen's Bench.”—24. An affidavit intituled “in the District Court,” instead of “in the Queen's Bench,” is irregular, not void. *Sanderson v. Cummings*, Mich. Term, 3 Wm. IV.

[Where an affidavit to hold to bail was taken before a Commissioner of the Common

Pleas and Exchequer, it was held not to be necessary that the style of the court should be inserted when sworn, but that it might afterwards be taken before such Commissioner, to be intituled and used in either court.—1 M. & W. 362.]

Several demands.—25. An affidavit of debt, stating that the defendant was indebted in 100*l.* for goods sold, money lent, and account stated, is sufficient, without stating the amount in which he is indebted for each separately, and it is not requisite in an affidavit on an account stated to say that the account was had. *Black v. Adams*, Easter Term, 3 Vic.

[See further requisites—cases 30 and 34, infra.]

Cannot be taken before plaintiff's attorney.—26. During the progress of a cause an affidavit to arrest the defendant cannot be taken before the plaintiff's attorney. *Burger v. Beaumer et al.*, iii. U. C. R. 179.

Certainty of.—27. An affidavit on which a ca. sa. is to be issued out, stating that the plaintiff hath good reason to believe that the defendant has made some secret and fraudulent conveyance of his property, &c., and not some secret or fraudulent conveyance, is good under the statute. *Ewing et al., v. Lockhart*, iii. U. C. R. 248.

On bond.—28. An affidavit of debt on a money bond must shew to whom the bond was made. *Case v. McVeigh*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Christian names of deponent.—29. An affidavit of debt must contain all the christian names of the deponent in full. *Westover v. Burnham*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Intituling of—Mention of several debts.—30. Where there is a cause pending, the affidavit to hold to bail must be intituled in that cause, otherwise the arrest will be set aside; and where more than one debt is mentioned in the affidavit, and the debts are not combined and the aggregate stated, the affidavit must clearly express the plain-

tiff's apprehension that the defendant will leave the province, with intent to defraud the plaintiff of the *several* debts mentioned; any uncertainty as to which of the debts the plaintiff apprehends he will be defrauded of, will be fatal. *Brown v. Pulmer*, iii. U. C. R. 110.

[Also 38, *infra*.]

Sunday — Deponent's residence — Work and labor — Request.]—31. It is irregular to make an affidavit of debt, or issue a writ on Sunday, and in an affidavit of debt, the proper place of residence of the deponent must be stated; and an affidavit for work and labor done, without stating a *request*, is defective. *Hall v. Brush*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Word "malicious," spelt with "t" instead of "c."]—32. It is no ground for setting aside an arrest that the word malicious is spelt with a "t" instead of a "c," in the affidavit of debt. *Gardener v. Morrison*, Hil. Term, 4 Vic., P. C. Jones, J.

On promissory note.]—33. An affidavit of debt, that the defendant was indebted in a named sum due on a promissory note, *due before the commencement of this suit*, the affidavit having been made several days before the writ issued, was held insufficient, as being equivocal and uncertain on a reference to the court in banc. *Clarke v. Clarke*, i. U. C. R. 395.

Several demands.]—34. An affidavit of debt for 80*l.*, on a promissory note for that amount, and also for goods sold, not specifying the sum due on each account, nor whether the goods sold formed the consideration of the note: *Held*, insufficient. *McKenzie v. Reid*, i. U. C. R. 396.

Jurat — Commissioner's name.]—35. Where a defendant was arrested under a commissioner's writ, and the commissioner's name was not attached to the jurat of the affidavit at the time of the arrest, although it was placed there before the motion was made to set the writ and arrest aside—the court held

the proceedings irregular, and set them aside with costs. *Black v. Halliday*, Trin. Term, 5 & 6 Vic., P. C. Macaulay, J.

Affidavit under old law, since 7 Vic. ch. 31.]—36. A defendant cannot be arrested since the statute 7 Vic. ch. 31, on a writ issued before that act was passed, on an affidavit required in the form by the old law. *Bruce v. Schofield*, i. U. C. R. 1.

Jurat.]—37. It is not sufficient to state in the jurat of an affidavit to arrest, since the passing of the 7 Vic. ch. 31, that the affidavit was read over and explained to the deponent by the commissioner antecedent to the swearing thereof, without stating that it was *duly* read over, &c. *Thayer v. Hensley*, i. U. C. R. 335.

Several causes of action.]—38. An affidavit of debt for the sum of 613*l.*, stated to be due as a distinct sum for each of three different causes of action, but concluding "that the said sum of 613*l.* is still due and owing to this deponent by the said Thomas Eccles, &c.," was held insufficient. *Barry v. Eccles*, ii. U. C. R. 383.

Affirmation by Quakers.]—39. Where the plaintiff, a Quaker resident in New York, made an affirmation of his claim before the recorder of that city, and his agent in this country also a Quaker, made another affirmation, proving the handwriting of the plaintiff and the recorder, that the plaintiff was a Quaker, and the person styling himself recorder was such, and had authority to take such affirmation, and that he was apprehensive the defendant would leave the province &c.—the court granted an order to hold to bail. *Smith v. Lawrence*, iii. O. S. 18.

Waiver of defect in.]—40. Where a defendant moved to set aside an arrest on the ground that the debt was paid, and the rule was refused, the plaintiff denying the payment on affidavit: *Held*, that he could not afterwards move for a defect in the affidavit

of debt. *Smith v. Ross*, Trin. Term, 3 and 4 Vic., P. C. Macaulay, J.

[But if the defendant demand particulars, or a declaration, he does not thereby waive defects in the affidavit to hold to bail. *Hodgson v. Douell*, iii. M. & W. 284.]

Irregularity in—Escape—Setting arrest aside.—41. The court will not set aside an arrest upon the ground of irregularity in the affidavit, after the prisoner has escaped. *Keefer v. Merrill et al.*, Tay. U. C. R. 675.

Setting aside arrest for defect in, after removal from inferior court.—42. Where after an arrest on bailable process issued from a district court, the proceedings were moved into the court of Queen's Bench by a writ of habeas corpus, and a motion then made to set aside the writ and arrest for a manifest defect in the affidavit of debt, the rules were made absolute, though it was shewn in the return of the writ that a similar motion was pending in the court below, on which no judgment had been given. *English v. Everitt*, i. U. C. R. 336.

On promissory note.—43. An affidavit to hold to bail on a promissory note must shew the amount for which the note was drawn. *Norton v. Latham*, Mich. Term, 3 Vic.

II. PRIVILEGE AND DISCHARGE FROM.

See ATTACHMENT, III. 2.—COGNOVIT, 1.—FOREIGN LAW, 2, 4. 5.—INSOLVENT ETC., passim.—JUDGMENT, 19.—SHERIFF, I. 19.

Suitor.—1. A suitor attending a court of requests is privileged from arrest. *Baldwin et al. v. Slicer*, iv. O. S. 131.

Attorney.—2. An attorney coming to court in term time on professional business which has been disposed of, is not privileged from arrest in execution. *Stroubridge v. Davis*, Mich. Term, 2 Vic.

Grand juror.—3. A person who

having attended as a grand juror at a court which adjourned for a few days, went into another district on private business, was held not to be privileged from arrest there during such adjournment. *Mittleberger et al. v. Clarke*, Mich. Term, 2 Vic.

Officer of the court.—4. An officer employed in executing the process of the court is privileged from arrest. *Welby v. Beard*, Tay. U. C. R. 415.

Judge of County Court.—5. The judge of a county court cannot be arrested upon mesne or final process. *Adams v. Acland*, vii. U. C. R. 211.

Barrister.—6. A barrister cannot be arrested on mesne process. *Ib.*

Judge of Surrogate Court.—7. The judge of a surrogate court for one of the counties of this province is exempt, on grounds of public policy, from imprisonment for debt. *Michie v. Allen*, vii. U. C. R. 482.

Discharge on reference to arbitration.—8. After an arrest for 613*l.*, and while the defendant was in custody all matters in difference between the parties were referred to arbitration, and an award made in favor of the plaintiff for 140*l.*—the defendant was discharged from custody. *Barry v. Eccles*, ii. U. C. R. 383, P. C. Hagerman, J.

9. Where a defendant was arrested, and in close custody on mesne process and pendente lite, the cause was referred by a parol submission to arbitration, followed by an award in the plaintiff's favor for a sum payable by instalments, one of which was due at the time of an application to discharge the prisoner from close custody, in consequence of the award: *Held*, that the prisoner under these circumstances, without shewing payment of the instalment due, was entitled to his discharge. *Ruthven v. Ruthven*, v. U. C. R. 279.

Discharge of one of two joint defendants.—10. The discharge of one

of two defendants in execution on a joint judgment, operates as a discharge of both. *Fisher v. Daniels et al.*, Easter Term, 2 Vic.

Statute 7 Vic. ch. 31—Operation on causes carried to judgment before as well as since the Act.—11. The statute 7 Vic. ch. 31, abolishing imprisonment in execution for debt, deprives the plaintiff of the power of arrest in execution as well in cases carried to judgment before as since the passing of that act. *Bank of British North America v. Clarke*, 1. U. C. R. 1.

[Upheld in next case.]

Operation of 7 Vic. ch. 31.—12. A defendant who has been charged in execution since the passing of the act 7 Vic. ch. 31, on a judgment obtained before the passing of that act, is entitled to be discharged from custody. *Bell v. Ley*, 1. U. C. R. 9.

Defendant arrested on mesne process and afterwards charged in execution without a new affidavit.—13. Where a defendant was arrested on mesne process and committed to prison, and afterwards charged in execution in the cause without a new affidavit before 7 Vic. ch. 31—the court held that he was not entitled to his discharge, as the plaintiff could issue a writ of capias ad satisfaciendum against him without a new affidavit, as well when he had been committed to prison on mesne process, as when he had been held to special bail. *Hamilton v. Mingay*, 1. U. C. R. 22.

Trial not had within three terms.—14. Where the defendant in custody put off the trial of a cause at one assize by affidavit, and at the next, being aware that the plaintiff had given no notice of trial, prevailed upon him to enter his record notwithstanding, and had it placed low on the docket, and the cause was not tried for want of time: *Held*, that the defendant was not supersedeable, on the ground that

the plaintiff had not proceeded to trial within three terms. *Gordon v. Fuller*, Hil. Term, 6 Wm. IV.

Liability of defendant once discharged to be again arrested on the same judgment.—15. A defendant discharged from custody by superseas, the plaintiff not having charged him in execution in due time, cannot be arrested again on the same judgment. *Burn v. Straight*, Trin. Term, 1 & 2 Vic.

Application for a suprsedeas by a prisoner rendered by his bail.—16. Where a prisoner surrendered by his bail after judgment, applies for a supersedes, the plaintiff not having charged him in execution in due time, he must shew when notice of render was given. *Jennings v. Ready*, Easter Term, 3 Vic.

III. SECOND ARREST, AND ARREST ON ALIAS WRITS.

Second arrest set aside, costs of first suit not paid.—1. A second arrest for the same cause of action was set aside, where the plaintiff had been non-prossed in the first suit and had not paid the costs. *McCague v. Meighan et al.*, 11. O. S. 516.

First, set aside for mistake in affidavit of debt.—2. A second arrest was allowed where the first had been set aside for a clerical mistake in the affidavit of debt, the plaintiff having discontinued that action and paid the costs. *Sheldon et al. v. Hamilton*, 111. O. S. 65.

Prisoner discharged from first arrest by giving a note which subsequently was dishonored.—3. The court refused to set aside a second arrest where the defendant had been discharged from the first, on giving a promissory note jointly with a third person and agreeing to pay the costs in a month, the note having been dishonored and the costs not paid, although

an action had been brought upon the note. *McDonald et al. v. Amm*, Easter Term, 2 Vic.

Discharge from first, on entry of appearance.]—4. Where a defendant was discharged from an arrest for defects in the affidavit of debt, on condition that he entered a common appearance, which he did, and he was afterwards arrested on an alias writ in the same cause, the arrest was set aside for irregularity, the plaintiff having no right to make a second arrest in that cause where the entry of an appearance is made a compulsory condition of the discharge from the first. *Benson v. Adams*, Easter Term, 3 Vic.

First, set aside for irregularity.]—5. Where a defendant had been arrested on mesne process, which was set aside for irregularity, and the plaintiff afterwards proceeded to judgment: *Held*, that he might again arrest the defendant on a *capias ad satisfaciendum*, issued on a new affidavit. *Gordon v. Sommerville*, Mich. Term, 7 Vic., P. C. Jones, J.

First, set aside for irregularity—Order of procedendo.]—6. Where after an arrest set aside for irregularity in a district court, the plaintiff arrested the defendant in the same cause on an alias writ under the statute, and the defendant then removed the cause into the Queen's Bench by *habeas corpus*, for the purpose of setting the second arrest aside; but, subsequently, took steps in the cause in the District Court, and did not put in special bail in the Queen's Bench—the court refused to set the second arrest aside, and ordered a *procedendo*. *Garfield v. Simons*, ii. U. C. R. 411.

Prisoner discharged cannot be detained by second writ issued by same plaintiff.]—7. A defendant discharged from an arrest cannot be detained in prison at the suit of the same plaintiff, upon a second writ issued upon an affidavit sworn while the defendant

was in custody upon the first writ. *Barry v. Eccles*, iii. U. C. R. 112.

[If there be several writs in the sheriff's hands, an arrest on one is an arrest on all. *Barrack v. Newton*, i. Q. B. 521; and if the first arrest be irregular, it invalidates subsequent detainers by the same plaintiff on other writs.—*Hall v. Hawkins*, iv. M & W. 591.]

Bail bond set aside.]—8. Where a defendant was arrested on an alias writ under 2 Geo. IV. ch. 1, and gave a bail bond to the sheriff after having entered an appearance to serviceable process: The bail bond was set aside with costs. *Douglass v. Powell*, Mich. Term, 2 Wm. IV.

Intituling of affidavit.—9. Where after service of non-bailable process the defendant was arrested and moved to set aside the arrest, on the ground that the affidavit of debt was intituled in the cause, and the plaintiff shewed that the defendant had been arrested under the statute allowing an arrest under an alias writ, on a testatum writ issued to a different district from that in which the first writ had been served: the rule was discharged, the testatum writ being deemed sufficient under the statute, and the affidavit rightly intituled in the cause. *Glass v. Colcleugh*, Easter Term, 3 Vic.

Action on the case—Judge's order for arrest on an alias writ, after entry of appearance.]—10. A judge's order cannot be obtained for the arrest of a defendant on an alias writ issued in an action on the case after appearance entered by the defendant to serviceable process, as the statute allowing the arrest on an alias writ after serviceable process applies only to cases where the cause of action is debt. *Ross v. Urquhart*, Mich. Term, 7 Vic.

11. And where a judge's order is necessary to arrest, a defendant cannot be held to bail on an alias writ, under the statute. *Bowman v. Yielding et al.*, Mich. Term, 2 Wm. IV.

Bail taken by a Justice for the appearance of an offender—Second

arrest before the time appointed.]—12. Where on complaint to a justice against an offender the justice takes bail for his appearance at a fixed time, a second arrest for the same charge by the same complainant, before the time appointed for hearing, is illegal. *King v. Orr*, Easter Term, 2 Vic.

IV. OTHER MATTERS.

See CONSTABLE, 5.—DISTRICT COURT, 1.—MALICIOUS ARREST, 1.—SHERIFF, I. 2, 3.

2 Geo. IV. chap. 1, sec. 8.]—1. Where an arrest is made upon a judge's order, and no sum is specified in the affidavit, the statute 2 Geo. IV. ch. 1, sec. 8, does not apply. *Sligh v. Campbell*, iv. U. C. R. 255.

Arrest by foreigner.]—2. Where both the plaintiff and the defendant were inhabitants of a foreign country, and had come together into this province with the intention of remaining only a few hours, and during their stay here the plaintiff made the usual affidavit and arrested the defendant: the arrest was held to be regular. *Raynor v. Hamilton*, Mich. Term, 2 Vic.

Informality of warrant as a ground for setting arrest aside.]—3. An informality in the warrant of the bailiff is not a sufficient ground to set the arrest under it aside, especially where the writ itself is not produced. *Hussey v. Link*, Easter Term, 2 Vic.

Order to arrest.]—4. An order to arrest was refused in actions for malicious arrest and libel. *O'Connor v. Anon*, and *Darcus v. Hall*, Trin. Term, 2 & 3 Vic.

Terms on setting aside arrest.]—5. The court will in general impose terms on a defendant, when an arrest is set aside for mere irregularity or a trifling error; but where an arrest is made for more money than is due, and there is a substantial defect, or if a manifest

injury has been sustained, the court will not interfere. *Billings et al.*, v. *Rapelje*, Mich. Term, 4 Vic.

In what case no arrest can be made.]—6. A plaintiff cannot arrest the defendant for the amount of purchase money paid for an estate conveyed to him by deed, upon the ground that the defendant, the vendor, was not lawfully seized; but he must resort to his covenant. *M'Lean v. Hall*, Tay. U. C. R. 676.

Bail bond cancelled for irregular arrest.]—7. Where a defendant has been arrested by one of two plaintiffs for 18l., and was afterwards arrested in the name of both for 18l. 10s., the former amount being included in the second—the court ordered the bail bond to be cancelled. *Ransom et al. v. Donohoe*, Tay. U. C. R. 678.

Commitment under 7 Vic. ch. 31, sec. 6.]—8. Under the statute 7 Vic. ch. 31, sec. 6, the court will not punish a defendant by commitment, unless upon his examination the cause of action and the circumstances connected with it would clearly warrant the court in taking such a course. No improper conduct being proved against the defendant, when brought up for examination under that section of the act, the court declined to commit him, leaving the plaintiff to recover satisfaction upon his judgment against the lands and goods of the defendant. *McCue v. Todd*, i. U. C. R. 278.

Irregularities—Prompt application.]—9. The rule as to the necessity of a prompt application in cases of irregularity, is not strictly applied in the case of prisoners. *Barry v. Eccles*, ii. U. C. R. 383.

Arrest by magistrate without summons.]—10. Under the statute 1 Vic. ch. 21, sec. 27, it is illegal in a magistrate to cause the arrest of a party in the first instance: he must first be summoned before him. *Croukhite v. Sommerville*, iii. U. C. R. 129.

Power of private persons to arrest for felony.—11. A private individual cannot arrest on suspicion of felony, he must shew a felony committed. *Ashley v. Dundas*, Easter Term, 2 Vic,

[See another case of an arrest by a private individual, 14 infra.]

Arrest contrary to agreement.—12. Where a debtor leaves the province, and returns upon an agreement that he is not to be arrested, provided that he immediately proceed to the settlement of his estate, and the creditors upon his return arrest him, alleging that he has broken the condition upon which he was not to be arrested, and the debtor applies to the court to set aside the arrest—the court will not discharge him from the arrest, but will leave him to his action on the agreement. *Sutherland v. Murphy*, iv. U. C. R. 176.

What is an arrest.—13. The deputy sheriff having a ca. sa. to arrest a party, went to his house with the writ in his possession for that purpose; he told him of the process, and being assured that a friend of his (the debtor's) who was then from home, would go his bail, he returned home and did not insist on the debtor coming with him. Afterwards, the sheriff went again to the debtor's house and told him, without laying his hands on him, that he must come to his (the sheriff's) house, which he did, and remained there till discharged—but not under actual constraint: *Held*, that under these facts, there had been no legal arrest of the debtor; that the merely insisting on the debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest; but that the debtor in having gone to the sheriff's house as desired, and having remained there till discharged, though without constraint, had been duly arrested. *McIntosh v. Demeray*, v. U. C. R. 343.

[Also, see MALICIOUS ARREST, 17.]

Arrest by private individual when

assaulted in the public street.—14. Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace. *Forrester v. Clarke*, iii. U. C. R. 151.

15. And in such a case it need not be averred or proved that the offender was taken to the nearest justice. *Ib.*

Irregularity in arrest—Special bail no estoppel.—16. Where a defendant puts in special bail to an alias bailable writ, he is not thereby prevented from objecting to any irregularity in the arrest. *Ross et al. v. Balfour et al.*, Mich. Term, 2 Vic.

ARREST OF JUDGMENT.

See DISTRICT COUNCIL, 18.—INDEMNITY BOND, 7.

Use and occupation.—1. It is no ground for arresting the judgment in an action for use and occupation, that the declaration does not shew that A. B., who occupied the premises, was tenant to the defendants, or that the defendants held under the plaintiff. *Moffat v. Macrae et al.*, Dra. Rep. 10.

Covenant on mortgage—averment of money being unpaid without stating how much due.—2. Where the plaintiff declared in covenant, and set out that the money was to be paid according to the condition of a certain bond, the balance due on which was alleged to be ascertained, and the breach assigned was, that the money was not paid according to the covenant, but did not state *the balance due*, the judgment was arrested. *Martin v. Woods*, Trin. Term, 3 & 4 Vic.

Qui tam action under 6 Geo. IV. ch. 114.—3. In a qui tam action to recover penalties under the imperial statute 6 Geo. IV. ch. 114, which

gives the penalty one-third to the King, one-third to the Lieutenant Governor, and one-third to the informer, the court refused to arrest judgment, on the ground that the plaintiff claimed the penalty *for himself and the King only*. *Jones qui tam v. Chace*, Dra. Rep. 334.

After a demurrer.—4. Judgment cannot be arrested after judgment is given on a demurrer. *Wragg v. Jarvis*, Trin Term, 6 & 7 Wm. IV.

Action of trespass—Declaration in trespass on the case.—5. A rule to arrest the judgment because the declaration commenced in trespass on the case, the action being trespass, was refused. *Bacchus v. McCann*, Trin. Term, 3 & 4 Vic.

Husband and Wife—Wife's interest not appearing in declaration—Objection after judgment by default.—6. In an action by husband and wife, judgment was arrested after judgment by default, on a declaration in debt, containing counts on a bond and the common counts, where the wife's interest did not appear in all the counts of the declaration. *Shuberg et ux. v. Cornwall*, Mich. Term, 5 Vic.

[Also see 13, *infra*.]

Verdict against executors for breach of promise of marriage by testator.—7. Where a plaintiff had recovered a verdict against executors, for a breach of promise of marriage made by their testator—the court would not (on the ground that such an action could not lie against *personal representatives*) arrest the judgment. *Davy v. Myers (executors of)*, Tay. U. C. R. 111.

Breach of covenant.—8. In an action of breach of covenant to make a lease of premises, it is no ground for arresting the judgment, that the premises are not *particularly set forth*, if the breach be as definitive as the terms of the covenant require. *Rowand v. Tyler*, iv. O. S. 257.

Tenant in dower stated to have been attached instead of summoned.—9. The court refused to arrest the judgment, because the tenant in dower was stated in the declaration to have been attached instead of summoned. *Robinet v. Lewis*, Dra. Rep. 172.

Declaration for board, &c.—10. “For that whereas the defendant on the 12th of July, 1849, was indebted to the plaintiff for meat, washing and lodging, goods, chattels and other necessities, then found and provided for one A. B., at the defendant's special instance and request.” On motion to arrest judgment on the following grounds—first, that it was not alleged that the goods, &c., were found *by the plaintiff*; secondly, or that they had been provided on *the credit of the defendant*: Held, declaration good after verdict. *Kendrick v. Maxwell*, vii. U. C. R. 94.

Semble: That the first objection would have been good on special demurrer. *Ib.*

Growing timber, if considered as chattels—Trespass.—11. Where plaintiff declared in trespass, for that defendant on, &c., with force and arms felled, &c., the trees, (viz, 115 oak trees), of the plaintiff's, *then growing and being in and upon certain lands in the county of Middlesex*, (not saying his own land)—the court refused to arrest the judgment, on the ground that the plaintiff could not sue for cutting down growing trees as for an injury to chattels, but that the action should have been for trespass to real property, laying the destruction of the trees as aggravation. *McMillan v. Miller*, vii. U. C. R. 544.

When rule nisi absolute, no cause being shewn.—12. On the return of a rule nisi to arrest judgment, though no cause be shewn, the court will not make the rule absolute, unless the party moving shew some substantial objection to the record. *Moffatt v. M'Crac et al.*, Dra. Rep. 10.

Husband and wife—Wife's interest not appearing in the declaration—Objection after verdict]—13. In trespass quare clausum fregit et de bonis asportatis, by husband and wife, where the general issue is pleaded, everything will be intended *after verdict* to support the declaration; and although the wife's interest do not clearly appear in all the counts of the declaration, yet it will be supported on motion in arrest of judgment. *Howe et ux. v. Thompson*, Mich. Term, 6 Vic.

ARSON.

See LIBEL AND SLANDER, I. 8; III (1), 1, 4, 5.—MALICIOUS PROSECUTION, 4.

ARTICLED CLERK.

See ATTORNEY, 1.

ASSAULT AND BATTERY.

See APPEAL, 6.—ARREST, IV. 14.—COSTS, I(1), 15.—NEW TRIAL, II. 4.—TRESPASS, II. 20.

Pleas of "son assault demesne" and "molliter manus imposuit"—Special demurrer.]—1. To trespass for assault and battery, and wounding plaintiff and biting off his fingers, and common assault against two defendants, the general issues were pleaded by both jointly, but they severed in their pleas of justification: first plea by one defendant, "molliter manus imposuit" to preserve the peace, plaintiff and the other defendant being fighting.—To first count first plea the same, and plaintiff disturbing family, &c.—Plea by another defendant to first count, "son assault demesne."—Special demurrer to all the pleas, that defendants had jointly negatived the assault and battery, and by their pleas they attempted to justify

the same specially.—Special cause overruled, but first and second pleas bad, "molliter manus imposuit" being no answer to the declaration; and fourth plea good as an answer—if there were any excess the plaintiff should have new assigned. *Shore v. Shore et al.*, ii. O. S. 65.

2. *Quare*: Whether where a defendant is charged with arresting, bruising, beating and ill treating the plaintiff, a justification of the mere arrest will be sufficient? *Jones v. Ross et al.*, iii. U. C. R. 328.

Plea of "son assault demesne"—Replication thereto.]—3. To a plea of "son assault demesne," to a declaration for assault and battery, a replication that the defendant committed a breach of the peace, and that the plaintiff, being a constable and having view thereof, arrested him, is a good answer. *Fido v. Wood*, Trin. Term, 7 Wm. IV.

Trespass—Justification, "molliter manus imposuit."]—4. Where in trespass the plaintiff declared for an assault and battery, and striking blows, whereby the plaintiff was greatly hurt, bruised and wounded, and the defendant justified the hurting, bruising and wounding, concluding "which are the same trespasses, &c.," the plea was held good on special demurrer. The plaintiff declared in the several counts for an assault and battery, and beating, bruising and wounding, and the defendant justified the assault and battery by a plea of "molliter manus imposuit:" *Held*, sufficient. *McLeod v. Bell*, iii. U. C. R. 61.

Conviction for same offence under Petty Trespass Act.]—5. In an action for assault and battery, a conviction for the same assault under the Petty Trespass Act, must be pleaded, and cannot be given in evidence under the general issue. *Heney v. Simpson*, Trin. Term, 1 & 2 Vic.

Plea of conviction under Petty Trespass Act, proof thereof.]—6. A plea

of conviction under the Petty Trespass Act, 4 Wm. IV. ch. 4, to an action for an *assault and battery*, is not supported by a proof of a conviction for an *assault* alone. *DeLong v. McDonell*, Easter Term, 2 Vic.

Insufficiency of justification—Master and servant.]—7. Where in trespass for an assault and battery, for *wounding and kicking, and for tearing* the plaintiff's clothes, the defendant justified as for a moderate correction of the plaintiff as his servant—the plea was held bad on demurrer, as it afforded no answer to the wounding and tearing the clothes of the plaintiff. *Mitchell v. Defries*, ii. U. C. R. 430.

Justification under legal process.]—8. *Semble*: That to a declaration in trespass, for assaulting, seizing and laying hold of the plaintiff, *and pulling and dragging him about*, a plea justifying the arrest by virtue of legal process, is no answer to the *pulling and dragging about*. *Beamer v. Darling*, vi. U. C. R. 211.

Justification under 4 Vic. ch. 26, secs. 20 and 28.]—9. In trespass for assault on the plaintiff's son, the defendant justified under the provincial criminal act 4 Vic. ch. 26, secs. 20 and 28—averments necessary to bring a justification within the provisions of that act. *See Madden v. Farley*, vi. U. C. R. 210.

ASSEMBLY (HOUSE OF).

See PARLIAMENT.

ASSEMBLY (MEMBER OF).

See PARLIAMENT, 2, et seq.

ASSESSMENT OF DAMAGES.

See AMENDMENT, III. 11.—BOND, II. 4.—COSTS, I(1), 11.—IRREGULARITY, 16, 19.—LIMITS, II. 11.—NEW

TRIAL, IV. 3.—NOTICE OF ASSESSMENT, 1.—TERM'S NOTICE, 4.—WRITS OF TRIAL AND INQUIRY, 8.

Assessment of contingent damages, where only demurrer to whole declaration.]—1. A plaintiff cannot under the 23rd rule of this court made in Hilary Term last, assess contingent damages where there is nothing on the record but a demurrer to the whole declaration. *Elliot v. Wilson et al.*, vii. U. C. R. 331.

Record—Blank for day on which judgment given on demurrer—Setting aside assessment of damages.]—2. The fact that a Nisi Prius record contains a blank for the day on which the court pronounced judgment on the demurrer, is no ground for setting aside the assessment of damages. *Gamble et al. v. Rees*, vii. U. C. R. 406.

Record after a demurrer—Filing of judgment paper—Irregularity.]—3. *Semble*: That in making up a record for an assessment of damages, after judgment has been given on demurrer, the more proper course would be, before the record is made up, to file a judgment paper in the office; but if this is done, the irregularity, if such it be, must be taken advantage of before damages assessed. *Id.*

Setting aside, for misapprehension of jury.]—4. The court refused to set aside an assessment of damages upon the ground that the verdict was too low from a misapprehension of the jury. *Perkins v. Scott, Tay*. U. C. R. 558.

Interlocutory judgment set aside on payment of costs and pleading issuably—Delay—Assessment.]—5. Where in a country cause a short time before the assizes, an interlocutory judgment was set aside by a judge's order on payment of costs, and that the defendant should plead issuably and take twenty-four hours' notice of trial, and the defendant tendered the costs and pleas the evening before the

first day of the assizes, at the same time serving a written demand of replication, and offering to take one hour's notice of trial, notwithstanding which the plaintiff, having previously given notice of assessment, went on and assessed damages—the court held the assessment regular, the defendant not shewing that his pleas were *issuable*, and the delay in his proceeding after the order was granted being too great. *Jessup v. Frazer*, Hil. Term, 4 Vic., P. C. Jones, J.

Contempt of judge's order—Setting aside assessment.]—6. Where an interlocutory judgment was set aside by a judge's order, but notwithstanding the order, the plaintiff proceeded and assessed damages—the court set the proceedings aside. *Staats v. Reynolds*, iv. O. S. 5.

ASSESSMENT (NOTICE OF).

See NOTICE OF ASSESSMENT.

ASSESSMENT ROLLS.

See DISTRICT COUNCIL, 17.

ASSESSMENTS.

See TAXES.

ASSETS.

See ARBITRATION AND AWARD, VI (1), 6.—EXECUTION, 13.—EXECUTOR ETC., III. 3, 4, 5, 6, 7, 8.

ASSIGNMENT (DEED OF).

See EJECTMENT, VII. 2, 3, 7.—ESCAPE, 18.—RELEASE.

Granting part — Habendum.]—Where the granting part of a deed of assignment transfers the *indenture* simply, and the habendum the *estate in the indenture*, the estate passes

under the assignment. *Doe dem. Wood et al. v. Fox et al.*, iii. U. C. R. 134.

ASSIGNMENT OF GOODS.

See FRAUDULENT DEED, *passim*.

ASSIZE (CLERK OF).

See CLERK OF ASSIZE.

ASSUMPSIT.

See ACCOUNT STATED.—BILLS OF EXCHANGE ETC.—COMMON COUNTS. FOREIGN JUDGMENT.—JUDGMENT AS IN CASE OF NONSUIT, I. 17.—MONEY HAD AND RECEIVED.—MONEY PAID.—USE AND OCCUPATION.—WORK AND LABOR.

I. ACTION GENERALLY, AND WHEN MAINTAINABLE.

II. PLEADINGS, EVIDENCE, AND DAMAGES.

I. ACTION GENERALLY, AND WHEN MAINTAINABLE.

See ARBITRATION AND AWARD, II. 2; VI(2), 1; VII. 1.—DIVISION II. OF THIS TITLE, 7.—AUCTION ETC., 6.—CONTRIBUTION, 1.—CORPORATION, 4, 5, 8.—DISTRICT COUNCIL, 11.—FRAUDS (STATUTE OF), I. 6. GAS COMPANIES, 3, 5.—GOODS SOLD.—INSURANCE.—MASTER AND SERVANT, 2, 4.—NIAGARA HARBOR AND DOCK CO.—PARTNERS ETC, 3, 4, 15.—ST. LAWRENCE CANAL.—STOCK NOTES.

Sale of goods at three months—Assumpsit not maintainable till expiration of credit.]—1. Where the plaintiff sold goods to the defendant, who was to give his note at three months for the price, but afterwards took away the goods without giving the note, and the plaintiff brought assumpsit for

goods sold before the three months had expired: *Held*, that he could not recover in that form of action, as he could only sue on the special agreement, until the time of the credit had expired. *Tinning v. Magrath*, Easter Term, 7 Vic.

Agreement for work upon credit—Failure of agreement—When assumpsit maintainable.]—2. Where work has been agreed to be done upon a certain credit, and the party, by failing to perform it within the time agreed upon, has disabled himself from suing upon the special contract, he cannot therefore recover in assumpsit before the expiration of the credit, under the agreement. *McMahon v. Coffee*, i. U. C. R. 110

Refusal to pay shares subscribed for in a contemplated steamboat—Assumpsit not maintainable.]—3. Where a party had subscribed for a certain number of shares in a steamer which another person intended to build, if he refuse to act and pay for the shares, an action can only be maintained on the special agreement, not for the price of the shares in the boat not yet built, as if they were a vendible commodity. *Cameron v. Thornhill*, i. U. C. R. 132.

Assumpsit for value of wild land and services rendered in procuring a patent therefor, maintainable.]—4. A. having a claim on the government for certain wild lands, gave a bond to B. to procure a patent for the same in B.'s name, on condition that B. should pay a certain sum therefor.—A. obtained the patent in B.'s name, and informing B. of it, requested payment, which was refused.—A. then brought assumpsit for the value of the land sold and for services rendered in procuring letters patent to B. granting him the land in fee simple: *Held*, that the action was maintainable. *Kilborn v. Forester*, Dra. Rep. 344.

Agreement under seal for completion of work by a certain person—A

person not mentioned in it, executes it also, assists in the work, and is looked upon as a contractor—Assumpsit maintainable by both.]—5. Where an agreement under seal, for the completion of certain work, had been entered into by one of two plaintiffs, and the other who was not mentioned in it, signed and sealed it also, and afterwards assisted in the work, and was recognized and paid by the defendant for whose benefit the work was done, as a joint contractor with the plaintiff mentioned in the instrument: *Held*, that assumpsit was maintainable by both for the value of the work, an implied parol agreement having been substituted for the instrument under seal. *Ross et al. v. Tait*, Hil. Term, 7 Wm. IV.

Sealed agreement for purchase of land—Money paid by vendee on account—Refusal by vendee to complete purchase—Remedy for recovery of money already paid.]—6. Where A. and B. entered into an agreement under seal for the sale and purchase of land, and B. paid 35*l.* on the agreement, but afterwards refused to complete the purchase, as the title could not be made good, and requested A. to pay back the money advanced, which he then promised to do, but afterwards refused to do, and B. brought an action of assumpsit against him in a district court and recovered judgment: *Held*, on a writ of error, that the action could not lie, the remedy being on the sealed instrument; and the judgment of the court below was therefore reversed. *Clarke v. Anderson*, Easter Term, 3 Vic.

Indebitatus assumpsit maintainable for chattels.]—7. Indebitatus assumpsit will lie for chattels, if their value be set forth in the declaration. *Lister v. Warren*, Mich. Term, 5 Vic.

Agreement for transfer of debts—Special assumpsit maintainable for non-performance.]—8. A. being indebted to B., and C. being indebted to

A., B. and C., without the assent or knowledge of A., agree that C. shall pay to B. the debt due to him by A., on condition that B. shall discharge A. from the debt owing by A. to B.: *Held*, that such agreement is binding on C., and that B. may maintain special assumpsit against him for its non-performance. *Tyrill v. Annis*, i. U. C. R. 299.

Advance of monies to two partners under a sealed agreement—A third person afterwards becomes a partner—Assumpsit against the three jointly.—9. Where an agreement was entered into under seal between A. B. and C. for the advance of certain monies by A. to B. and C., who were partners in a mill business, and who, from the assets arising from the business, were to repay such advances.—

D. afterwards becomes a partner with B. and C.: *Held*, that A. could not maintain an action of assumpsit against B., C. and D. jointly for the recovery of the balance of such advances. *Mittleberger et al. v. Merritt et al.*, i. U. C. R. 330.

Special agreement for certain work—Defendant sells the property before completion thereof—Assumpsit maintainable.—10. Where in assumpsit for work, labor and materials, in building part of a house, with the general issue pleaded, it appeared at the trial that the work had been done under a special agreement, the terms of which had not been complied with, but that the defendant had the work valued at a certain sum, having sold the property, and the plaintiff then left the work and brought his action: *Held*, that the action was well brought on the common counts. *Aitkin v. Malcolm*, ii. U. C. R. 134.

Special agreement with a particular person for certain work—Plaintiff thinking another person to be interested in the work, sues both jointly in assumpsit—Not maintainable.—11. A. contracts by deed with B. to sell

him certain timber off his lot, to be paid for by B. at certain fixed times, B. being in default under his special agreement, and A. supposing C. to have a joint interest in the timber with B., sues B. and C. on an implied assumpsit: *Held*, that though A. might sue B. alone on an implied assumpsit, yet that, being concluded by the deed as to the parties liable on the contract, he could not sue B. and C. jointly. *Armstrong v. Anderson et al.*, iv. U. C. R. 113.

Sufficiency of consideration to maintain assumpsit.—12. A special assumpsit to pay in grain, or in any particular manner, or at a future time, a continuing debt, in respect to which the law had raised an implied assumpsit to pay in money on request, is a binding promise supported by a good consideration. (Macaulay, J. dissentiente.) *Belcher v. Cook*, iv. U. C. R. 401.

Services rendered for a relative under the expectation of sharing in his will, are not sufficient grounds to maintain assumpsit.—13. Where services are performed for a relative or other person upon a mere reliance that the party serving will share his bounty under his will, such services do not afford the ground of an action as upon an implied assumpsit to pay in money. *Whyatt v. Marsh*, iv. U. C. R. 485.

Consideration—General principle of.—14. If the plaintiff part with anything that is of value to himself to obtain the defendant's promise, that forms a valid consideration for the promise, though the thing parted with may be of no legal value in the defendant's hand. *Bradford et al. v. O'Brien*, vi. U. C. C. 417.

Compromise of penal action without leave of the court—How far consideration for assumpsit.—15. Where it clearly appears on the face of the declaration, (which was not so apparent in this case—see judgment,) that the consideration of the defen-

dant's promise was a compromise, without leave of the court, of a penal action, brought by the plaintiff as a common informer against the defendant, the consideration will be held to be illegal, and the declaration bad. *Hart v. Meyers*, vii. U. C. R. 416.

II. PLEADINGS, EVIDENCE, AND DAMAGES.

See BAILMENT, 2, 3.—EVIDENCE, II. 2.—GAS COMPANIES, 4.—GUARANTEE. — INSURANCE — MASTER AND SERVANT, 1, 5.—PRACTICE, I. 26.—STOCK NOTES.

Agreement — Mode of declaring thereon.]—1. An agreement to do certain work cannot be declared on as a promissory note—the consideration for such agreement and breach, must be properly averred. *Down v. McNamara et al.*, iii. U. C. R. 276.

Averments on special agreement.]—2. In declaring on a special agreement, *Quære*: What must be averred in the declaration to have been done; or what may be left to be set up as matter of defence in the plea if it has not been done. *Semble*: That the intention of the parties to be reasonably collected from the whole instrument, must govern. *Ewart v. Bowes*, v. U. C. R. 446.

Declaration on promise to continue a former agreement—Averments necessary.]—3. Where a defendant is sued upon a promise to continue a former agreement, which at the time of the alleged promise is about expiring, the plaintiff should state in his declaration the precise terms of the former agreement; and also, aver that the terms so stated composed the whole of the former agreement. *Barnes v. McKay*, v. U. C. R. 246.

The promise should be alleged in direct terms.]—4. In an action of assumpsit, the promise of the defendant should be alleged in direct terms; the

averment therefore, that the defendant addressed a letter to the plaintiff, in which he promised, &c., not being a precise allegation that the defendant promised, but that the letter says he did, is bad. *Ib.*

Averment of readiness.]—5. In a declaration against a miller, for not delivering flour ground by him from wheat sent to him by the plaintiff, on an agreement that he would grind and deliver the flour at a reasonable price—the omission of the averment of *readiness* to pay the price is bad, on demurrer. *Counter v. Jones*, Easter Term, 2 Vic.

Indebitatus assumpsit for chattels — Form of declaration.]—6. In declaring in indebitatus assumpsit for chattels, their value should be set forth in the declaration; and the plaintiff may also declare in indebitatus assumpsit, for chattels as on an account stated. *Lister v. Warren*, Mich. Term, 5 Vic.

Assumpsit, when maintainable—Plea of coverture.]—7. Where the defendant promises, that if the plaintiff would convey a certain property to Mrs. A. B., and take a mortgage from her for payment of the purchase money by a certain day, the money should be paid on that day: *Held per Cur.*, reversing the judgment of the court below, that an action of assumpsit would well lie against the defendant on the non-payment of the mortgage, and that the plea of Mrs. A. B.'s coverture, would be a bad plea; *Semble*, however, that such a plea would be a good defence where a promise of the defendant is set up in the declaration, as founded on a consideration of the plaintiff's forbearance to sue a married woman for a debt alleged to be *previously due* by her. *Nichols v. McGill*, vii. U. C. R. 233.

Evidence—Damages.]—8. *Quære*: If in assumpsit on a contract to carry goods safely, with an averment of total loss, and a plea that the goods were

carried safely, and no evidence given to shew that any of the goods were lost, but only that the cask in which they were packed was injured, and some of the goods damaged, is the plaintiff entitled to recover anything, or more than nominal damages. *Hancock v. Bethune*, iii. U. C. R. 47.

Indebitatus assumpsit—*Plea, general issue and payment into court—Plaintiff must prove damages.*—9. Where in *indebitatus assumpsit* the defendant, as to all the monies in the declaration, except as to 33*l.* 14*s.*, pleaded the general issue, and as to that sum, pleaded payment of 1*l.* 1*s.* 8*d.* into court, and no damages *ultra*; and the plaintiff replied, that he had sustained greater damages, but at the trial obtained a verdict for the difference between the sum of 33*l.* 14*s.* and 1*l.* 1*s.* 8*d.* paid into court, as a sum admitted on the record without giving any evidence—the court set the verdict aside, as it was incumbent on the plaintiff to prove damages, no specific sum being admitted on the record in this form of action. *Ross et al. v. Garrison*, Hil. Term, 7 Vic.

Agreement to deliver wheat—Failure—Declaration thereon—Evidence.—10. Upon an agreement to deliver wheat for the plaintiff at the mill of a third party, naming him, the plaintiff averred in his declaration, “that he was always willing to accept the wheat at the place aforesaid, whereof the defendant had notice:” *Held*, on motion in arrest of judgment, declaration good. *Held* also, that it was not necessary for the plaintiff to prove, under this agreement, a request on his (the plaintiff’s) part to the defendant to deliver, or that he was at the mill of the third party to accept a delivery of the wheat. *Wright v. Weed*, vi. U. C. R. 140.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

See ARBITRATION AND AWARD, VI(1). ATTORNEY, II(3).—EJECTMENT, IV(2).—SHERIFF, II.

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- I. WHEN GRANTED.
 - II. PRACTICE ON.
 - III. OTHER MATTERS.
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I. WHEN GRANTED.

See ABSCONDING DEBTOR, *passim*.—ARBITRATION ETC., I. 2, 3.—CERTIORARI, 4.—COSTS, VII. 6; VIII. 2.—EJECTMENT, VII. 4.

Against deputy clerk of the crown.—1. An attachment was granted against a deputy clerk of the crown for having issued serviceable process without authority; and afterwards, on his appearance in term to answer interrogatories, the court ordered him to be dismissed from his office, and to pay the costs of the proceedings. *Rex v. Fraser*, iii. O. S. 237.

Against District Court Judge.—2. An attachment will not be granted against a judge of a district court, for not obeying a writ of certiorari, unless it be shewn that he is acting contumaciously. *Judge Niagara District Court, In re*, iii. O. S. 437.

Against absconding debtors.—3. See “Absconding Debtor,” *passim*.

Against attornies.—4. See “Attorney,” II(3), *passim*.

Against sheriffs.—5. See “Sheriff,” II.

Against witnesses.—6. See “Subpoena,” 2, 3, 5.

In ejectment.—7. See “Ejectment,” IV(2).

On awards.—8. See “Arbitration and Award,” VI(1).

Second attachment—Costs of former one.—9. A second attachment was refused, until the costs of setting aside

a former one had been paid. *Rex v. Ruttan*, Easter Term, 6 Wm. IV.

II. PRACTICE ON.

See **ABSCONDING DEBTOR**, passim.—**ARBITRATION AND AWARD**, VI(1), passim.—**ATTORNEY**, II(3), passim.

Service of rule nisi.—1. A rule nisi for an attachment must be personally served, and the original shewn at the time of service. *Crysler v. Campbell*, i. U. C. R. 416.

[Not so if it be shewn that the party knows of the rule, and is evading the service. *In re., Whaley*, xiv. M. & W. 731; contra, *Wilkinson v. Pennington*, 6 Dowl. 183.]

Affidavit of service of rule.—2. The affidavit of service upon which the rule for an attachment is founded, is good, though it state the service as made on the day of a certain month, *instant*, without stating *the year*. *Regina v. Tomb*, iv. U. C. R. 177.

Demand under power of attorney.—3. Where a demand of costs to ground an attachment is made under a power of attorney, it must be shewn that a copy of the execution of the power has been served. *Marcy v. Butler*, Easter Term, 2 Vic.

[Upheld in *Morrison v. Lowden*, Trin. Term, 2 & 3 Vic.; *Qua v. Holmes*, Easter Term, 3 Vic.; *Brewster v. McEwen*, infra. 4, and so in the English Courts in the cases of *Doe dem. Copea v. Johnson*, 7 Dowl. P. C. 550; *S. C. Anon*, 1 W. W. & H. 549, 3 Jur. 23. But see the latest case on this point, that of *Sanders v. McSherry*, infra. 5.]

Demand, under power of attorney—Affidavit.—4. Where a rule on an attorney required that the money should be paid within a month after service, an attachment for non-payment was refused, no copy of the affidavit of the execution of the power of attorney under which the money had been demanded having been served, and the affidavit of the non-payment stating only that the money had not been paid within the month, and not negating payment after the month. *Brewster v. McEwen*, Easter Term, 3 Vic.

5. In moving for an attachment for non-payment of costs, where the demand has been made under a power of attorney, it is not necessary to shew that at the time of the demand a copy of the affidavit of the execution of the power of attorney was served. *Sanders v. McSherry*, Mich. Term, 5 Vic.

Judge's order made a rule of court—Demand under the order before it became a rule of court.—6. An attachment for non-payment of costs under a judge's order subsequently made a rule of court, where a demand had been made under the order, but not after it had become a rule of court, was refused. *Culver v. McDonnell*, Trin. Term, 7 Wm. IV.

Order of Nisi Prius must be made a rule of court.—7. An attachment will not be granted on the order of a judge at Nisi Prius until such order be made a rule of court. *Plumb v. Miller*, Hil. Term, 7 Wm. IV.

Demand—Part payment received—Demand necessary for residue.—8. Where a plaintiff was ordered to pay costs, and a demand of them was made on the master's allocatur, when he paid a part, which was received: *Held*, that an attachment could not be granted for the residue without a new demand. *Hyatt v. Anger*, Easter Term, 3 Vic.

Demand made by attorney.—9. Where a rule directed costs to be paid to a party in a cause, an attachment was granted on a demand made by his attorney. *Kimball v. Ripson*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Affidavit to set aside—How to be intituled.—10. An affidavit to set aside an attachment must be intituled on the crown side, and not in the names of the parties to the suit. *Malloch v. Morris*, Trin. Term, 1 & 2 Vic.

[Also, see 12, infra.]

Motion to set aside, after arrest—Objections raised which might have

been made in shewing cause.—11. Where at the time of granting an attachment against a plaintiff for non-payment of costs pursuant to a rule, cause was shewn and several objections taken, which were overruled: *Held*, that after the plaintiff's arrest under the attachment, he could not move to set it aside for irregularity on other grounds of objection, which might have been urged on shewing cause when the application was made for the writ. *Regina v. Hyatt*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

Affidavits to set aside, how intituled.—12. After an attachment has been ordered, although it has not issued, affidavits made use of to set aside the rule for it must be intituled on the crown side. *Garland v. Burrows*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

III. OTHER MATTERS.

See ESCAPE, 11, 12, 13, 14, 15.—LIMITS, II. 4.—SHERIFF, I. 7.

Costs against unsuccessful prosecutor.—1. Where the defendants had been brought into court upon an attachment, although they cleared themselves upon interrogatories of the imputed contempt, the court refused to allow costs against the prosecutor, even although he had omitted a fact in his affidavit which might have affected their decision upon granting the attachment, and although one of the affidavits upon which the attachment was moved for was not filed early enough for them to answer by a counter affidavit. *Rex v. McKenzie et al.*, Tay. U. C. R. 85.

7 Vic. ch. 31, sec. 8.—*What must be shewn by a party moving for his discharge under—Service of notice of motion.*—2. A party moving under 7 Vic. ch. 31, sec. 8, for his discharge from custody on an attachment, must shew that he is in contempt for non-payment of money; and the notice of his inten-

tion to move for his discharge must be served on the opposite party and not on his attorney. *Garrison v. Balkwell et al.*, i. U. C. R. 2.

Attachment for costs stayed, owing to misconduct of attornies.—3. Where expenses have been vexatiously incurred in conducting a suit by the attornies on both sides, the court, to protect the client, will order an attachment, though regularly issued, to be stayed, without costs, upon payment of the money due. *Regina v. Cameron*, in the suit of *Playter v. Cameron*, iv. U. C. R. 165.

—◆— ATTAINDER.

See TREASON.

—◆— ATTESTATION.

See EVIDENCE, V. 2, 3, 5, 6.

—◆— ATTORNEY.

I. ARTICLED CLERKS.

II. DUTIES AND LIABILITIES.

(1), *Duties, and liability for negligence or misconduct.*

(2), *Other Liabilities, and Pleadings.*

(3), *Summary proceedings against.*

III. FEES.

IV. RIGHTS, AND MISCELLANEOUS MATTERS.

—◆— I. ARTICLED CLERKS.

Service of, with agent in this province.—1. An articulated clerk can serve only one year with the agent of the attorney in this province. *Gilkinson In re*, Hil. Term, 7 Wm. IV.

Clerk carrying on business where attorney is not resident.—2. It was stated by the court that where an arti-

cled clerk carries on business in a place where the master does not reside, that the time so spent will not be computed in his service. *McIntosh v. McKenzie, In re*, Mich. Term, 1 Vic.

Loss of articles.—3. Where an attorney's clerk had lost his articles of clerkship, he was sworn in on an affidavit of the loss, and producing the usual certificate of service. *Loring, In re*, Mich. Term, 2 Vic.

Engaged in other occupations whilst under articles.—4. An attorney was struck off the rolls, where it was shewn on affidavit that during the entire period he was under articles he was a salaried clerk attending a public office. *Ridout, In re*, Trin. Term, 2 & 3 Vic.

When a student may be admitted upon his own affidavit of service.—5. A person may be admitted an attorney of this court upon his own affidavit of service, where the attorney to whom he was articulated is absent from the province. *Radenhurst, ex parte*, Tay. U. C. R. 175.

Insufficiency of certificate of master.—6. A certificate from the master, and an affidavit of the person entitled, stating "that he had during his clerkship done everything required of him," was held not sufficient to entitle him to be admitted an attorney of this court. *Lyons, ex parte*, Tay. U. C. R. 220.

Absence for a year on account of ill health.—7. An articulated clerk who having served four years, obtained his master's consent to go to England for the benefit of his health, with the intention of returning at the end of six months, but his health still continuing bad, he with his master's permission remained six months longer: The court on his return admitted him as an attorney. *Hagarty, In re*, Mich. Term, 5 Vic.

Application to strike attorney off the rolls for being two years absent

whilst under articles.—8. On an application for an attachment against an attorney for having improperly granted a certificate of actual service to A. B. an articulated clerk, when he had been absent from his service on account of ill health for nearly two years whilst he was under articles, and to strike A. B. off the rolls, on which he had been admitted more than two years before, the court refused both rules, on the ground of the long time that had elapsed since the clerk's admission as an attorney; but they made his master pay the costs of the application. *Holland, In re*, Trin. Term, 5 & 6 Vic.

II. DUTIES AND LIABILITIES.

- (1), *Duties, and Liability for Negligence or Misconduct.*
- (2), *Other Liabilities, and Pleadings.*
- (3), *Summary Proceedings against.*

- (1), *Duties, and Liability for Negligence or Misconduct.*

Delivery of brief to counsel—Negligence in not doing so.—1. A. retains B., an attorney living in Kingston, to defend him in a suit to be tried at the Perth assizes.—Before the trial, A. comes to Kingston to advise with B., B. tells A. that having no other case at Perth, he cannot go there in this one suit, but that C., who is a barrister residing at Perth, would attend to it, and that A. had better see him on the subject.—A. makes no objection, but goes to Perth and instructs C. in his defence—C. conducts the suit at the trial—a nominal verdict is given against A.—No complaint is made that C. mismanaged the cause in any way: *Held per Cur.*, that under these circumstances B. is not liable to an action for negligence at the suit of A., in not himself making up a brief and delivering it to C. (Macaulay, J. dissen-

liente). *Kenney v. Armstrong*, iv. U. C. R. 196,

Duty under the ordinary retainer, as to issuing execution, &c.]—2. It is no part of an attorney's duty, under the ordinary retainer, to issue an execution and to collect the money upon the judgment—his authority ceases with the judgment. Where therefore, in an action against an attorney, the plaintiff states the promise to be, that the defendant would prosecute and conduct a certain action in a skilful and diligent manner, and then lays as a breach of the defendant's undertaking to prosecute the action &c., that he delayed to issue execution, without averring any special retainer to do so: *Held per Cur.*, declaration bad on general demurrer. *Searson v. Small*, v. U. C. R. 259.

Duty, as to taking unfair advantages.]—3. *Semble*: That an attorney would not be liable for culpable negligence, in not urging for his client the defence, that the agreement upon which he was sued was made on a Sunday, as it is no part of his professional duty to take all dishonest advantages. *Vail v. Duggan et al.*, vii. U. C. R. 568.

Misconduct in acting without authority.]—4. Where on an application by a defendant to set aside proceedings in a cause, he swore that no process had been served on him, and that an attorney who had accepted process and entered an appearance for him, had acted without authority—the court ordered that the attorney should file an affidavit accounting for his entry of appearance. *Weir v. Hervey et al.*, Hil. Term, 4 Vic.

5. Under the circumstances, as mentioned in the last case, the court the following term set the proceedings aside, and ordered that the attorney should pay all the costs. *Ib.*, i. U. C. R. 430.

[See case number 8, *infra*.]

Breach of faith.]—6. Where a declaration in ejectment had been

served on a wrong party, and the attorney of the lessor of the plaintiff wrote to the attorney of the person who ought to have been served that if he would waive the irregularity and go to trial, that no action for mesne profits should be brought against his client, if the lessor of the plaintiff should be successful; and the defendant's attorney accordingly went to trial, and the lessor of the plaintiff obtained a verdict and judgment—the court stayed the proceedings in an action which was afterwards brought by the attorney to recover mesne profits from the defendant, and ordered that the attorney should pay the costs. *Stephenson v. M'Combs*, i. U. C. R. 456.

22 Geo. II. ch. 46.]—7. To subject a person to the penalty of 22 Geo. II. ch. 46, for suing out process, &c., the attorney allowing his name to be used must first be convicted. *Rex v. Bidwell*, Tay. U. C. R. 670.

Striking off the roll.]—8. An attorney who had been ordered to pay the costs of setting aside proceedings, in an action in which he had acted without authority, having afterwards written a highly improper and unjustifiable letter to the Chief Justice, impugning his motives in the judgment which he had given, and stating that he was actuated from personal and private feelings of dislike towards him: The court directed that a rule nisi should issue to strike him off the rolls; and no proper nor sufficient apology having been made, the rule was afterwards made absolute. *Hervey, In re*, Mich. Term, 5 Vic.

Assumpsit for negligence—Misdirection.]—9. In an action of special assumpsit against an attorney for negligence in discharging the plaintiffs' debtor, who was in custody on a capias ad satisfaciendum, without any authority from the plaintiffs for so doing, it is no misdirection to tell the jury that the damages are discretionary, and that it is not incumbent on them to give the

plaintiffs a verdict for the whole amount of their debt. *Bradbury et al., v. Jarvis*, i. U. C. R. 301.

Charge of fraudulent breach of duty.—10. An attorney is not responsible as for a fraudulent breach of duty, for an erroneous opinion given to a client on a question arising on a will. *Alexander v. Small et al.*, ii. U. C. R. 298.

Liability for negligence—Failure of proof of special damages—Nominal damages.—11. Where an attorney was retained to make an application to the court to release a sheriff from an attachment, and the jury in an action for negligence in conducting the application found that he was in fault: *Held*, that he was liable to nominal damages for such negligence, although all the grounds of special damage laid by the plaintiff failed. *McLeod v. Boulton*, iii. U. C. R. 84.

Assignees of insolvents to sue for negligence.—12. Under the 1st, 8th and 18th clauses of the Insolvent Debtor's Act, 8 Vic. ch. 48, the right to sue an attorney for negligence vests in the assignees of the insolvent plaintiff, and not the plaintiff himself. *Alexander v. A. B. & C. D., Attornies*, v. U. C. R. 329.

(2), Other Liabilities, and Pleadings.

See TRESPASS, I. 3.—TROVER, I. 6.

Liability for sheriff's fees.—1. An attorney is liable to the sheriff for fees on executing writs, and for services rendered for him in causes of his clients, without any special undertaking. *Jarvis v. Washburn*, Dra. Rep. 171.

[The writs, &c., served in this case would seem to have been *mesne process*.—See *Corbett v. McKenzie*, *infra* 3.]

Action against, for money received for client—Defence of fraud.—2. It is no defence in an action against an attorney for money received by him on

account of his client, that the judgment on which the money was paid was obtained through fraud of such client. *Williams v. King*, Easter Term, 1 Wm. IV.

Liability for sheriff's poundage on executions.—3. No action lies by the sheriff against the plaintiff's attorney in a cause to recover poundage upon an execution which the attorney has placed in his hands to be executed. *Corbett v. McKenzie*, vi. U. C. R. 605.

[So *Maybery v. Mansfield*, 16 L. J., Q. B. 102; 11 Jur. 60; *Seal v. Hudson*, 2 B. C. R. 55.]

Action against, for false imprisonment—Justification.—4. Where in an action against an attorney for false imprisonment on a writ alleged to be void, the plaintiff produced the writ to connect the attorney with the arrest: *Held*, that the attorney could not justify under the writ so produced by the plaintiff, without a special plea. *O'Reilly v. Armstrong*, Easter Term, 4 Vic.

Negligence—Declaration.—5. A declaration against an attorney for negligence, is sufficient in stating generally that by the negligence of the defendants he (the plaintiff) lost his cause—it need not point out what the negligence consisted in. *Vail v. Duggan et al.*, vii. U. C. R. 568.

(3), Summary proceedings against.

See div. III. 12.

Where matters of complaint indictable.—1. The court will not proceed summarily against an attorney upon a complaint of matters for which (if the charge were true) he might be indicted; especially where the affidavits in support of the charge are contradicted by other affidavits. *Patterson v. Miller, In re*, i. U. C. R. 256.

Purchasing securities from client.—2. Where an attorney purchases securities from his own client, using no undue

advantage in the transaction, the court—though they may disapprove of the act, cannot punish him as for any violation of his duty. *Bartlett v. Meyers, In re*, i. U. C. R. 252.

[So where an attorney in order to secure a balance due to him from a client, insured the life of that client and received the amount of the policy, the court refused to interfere summarily to compel him to deliver the policy to the administrator of the client. *In re Lord Cardross, v. M. & W.* 545.]

Will not be ordered to pay costs due by client without express undertaking.—3. An attorney will not be ordered by the court to pay the costs due by his client to the opposite party, unless he has by himself, or by his agent expressly authorized in that behalf, positively engaged to do so. *Ross v. Calder*, iii. U. C. R. 180.

[Nor is he held to be personally liable for the payment of fees to a witness for giving evidence in a cause. *Robins v. Bridge*, iii. M. & W. 114.]

Will not be ordered to pay costs of suit on a bond to the limits signed by him in behalf of an obligor.—4. The court refused to order an attorney to pay the costs of a suit on a bond to the limits where he had signed the name of one of the obligors and executed the bond in his behalf, on a mere parol authority. *Leonard v. Glendenman*, Mich. Term, 1 Wm. IV.

Where grounds of complaint mere inadvertency and actionable.—5. The court will not proceed by attachment against an attorney on a charge of malpractice, where his conduct has been merely inadvertent and the party complaining has a remedy by action. *Stuart, In re*, Hil. Term, 6 Wm. IV.

Will not be ordered to pay money belonging to absconding debtors and attached in his hands.—6. The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark v. Stover*, Trin. Term, 3 & 4 Vic.

Renewal of lapsed rule.—7. Where

a rule nisi for an attachment against an attorney for non-payment of money had lapsed, the court refused to renew the rule without a fresh affidavit. *Roy v. DeLay, Tay.* U. C. R. 5.

Where money received by him as an agent, and not attorney.—8. The court will not grant an attachment against an attorney for not paying over money received by him as an agent, and not in his professional character; but if from the circumstance it appears that the attorney is not trustworthy, the court would probably interfere on a motion to strike him off the rolls. *O'Reilly, In re*, i. U. C. R. 392.

Practising in District Court—Non-payment of monies received for client. 9. An attorney of the Court of Queen's Bench practising in a district court, is liable to an attachment for not paying over monies received for his client. *Carruthers v. ——— one &c.*, Tay. U. C. R. 326.

Money forwarded to client but lost by accident.—10. The court will not issue an attachment against an attorney to compel him to pay over money to his client which he had in fact forwarded but which had been lost by accident. *Radcliffe v. Small, Tay.* U. C. R. 421.

Power of court to prevent attorneys pleading the Statute of Limitations unjustly.—11. *Semble*: That the court has power to prevent an attorney pleading the Statute of Limitations to defeat a client's just claim; but that this power does not extend to his executors. *Dougall v. Cline, (executors of)*, vi. U. C. R. 546.

III. FEES.

See COSTS, I(2), 10.—PLEADING, I. 8, 10; II. 24; III. 9.

2 Geo. II. ch. 23—*Bill to be delivered a lunar month before action—Service of.*—1. The month required by 2 Geo. II. ch. 23, for the delivery

of an attorney's bill before the issuing of process, is a *lunar* and not a calendar month, and the day of the service of the bill is included in the computation; and an admission of such service indorsed on the copy of the bill by the defendant's attorney for the purposes of trial, must be taken to admit an effectual service. *Berry v. Andruss*, iii. O. S. 645.

Delivery of bill must be proved in an action for fees.—2. In an action by an attorney for his fees, he must prove the delivery of his bill, although the defendant has suffered judgment by default. *Ridout v. Brown*, iv. O. S. 74.

Service of bill—Onus probandi.—3. Where an attorney served his bill of costs on the 20th May, and the placita on the nisi prius record were intituled as of Trinity Term, which commenced on the 16th of June—not a lunar month after such service—but a memorandum was added—to wit, *11th July*—and the plaintiff proved that his declaration was filed on that day, but did not produce the writ: *Held*, sufficient to entitle him to a verdict; and that if the writ were issued too soon, the defendant should shew it. *McMartin v. Spafford*, Mich. Term, 6 Wm. IV.

Defendant entitled to copy of bill, although he may have admitted the amount.—4. A defendant sued by an attorney for his fees is entitled, one month before action brought, to have a copy of the bill, signed &c., according to the statute, even though he may have explicitly admitted the amount of the bill to be due. Where therefore, to a declaration by an attorney for his fees, containing a count upon the account stated, the defendant pleaded no bill delivered &c., and the plaintiff demurred: *Held per Cur.*, plea good. *Dempsey v. Winstanley*, v. U. C. R. 317.

Bill, by whom to be signed in case of partners—2 Geo. II. ch. 23, sec. 23.]

5. The attorneys who commence the action must sign the bill of costs delivered; where therefore three attorneys composing a firm commenced the action and only one of them signed the bill: *Held*, bill insufficient. *Sullivan et al. v. Bridges*, v. U. C. R. 322.

[See *Owen v. Scales*, x. M. & W. 657.]

Bill ordered for taxation after payment.—6. An attorney's bill, which contained some exorbitant charges, was ordered for taxation, although it had been paid and several months had elapsed since its delivery. *Doe dem. Fraser v. Eaglesum*, Hil. Term, 6 Wm. IV.

[See *Morden v. Morgan*, infra, 11. An application for an order of this description must be made to the court in which some of the business was done. *In re Lord Cardross*, v. M. & W. 545.]

When fees may be recovered in a cause not conducted to issue.—7. An attorney may maintain an action for his fees in a cause which he does not bring to a conclusion, if he can account satisfactorily for not proceeding. *Ford et al. v. Spafford*, Hil. Term, 7 Wm. IV.

[See *Smith et al. v. Graham*, infra, 13.]

Sufficiency of proof.—8. In an action by an attorney for his fees, proof by a copy made up from his books after delivery to the defendant, is sufficient. *Hall v. Shannon*, Easter Term, 2 Vic.

Proceedings for fees after plea of release puis darrein continuance.—9. An attorney cannot proceed for his costs after a plea of release puis darrein continuance, unless he establish a clear case of fraud. *White v. Boulton*, Easter Term, 2 Vic.

Plea of no bill not a plea to the merits.—10. A plea that a copy of the attorney's bill was not delivered according to the statute, is not a plea to the merits. Judgment for the defendant therefore is no bar to a second action. *Dempsey et al. v. Winstanley*, vi. U. C. R. 409.

Order for taxation, after payment.]

—11. An order for the taxation of an attorney's bill was refused, where it had been paid and acquiesced in. *Morden v. Morgan*, Easter Term, 2 Vic.

Illegal charges.]—12. Where an attorney of the Court of Queen's Bench practising in an inferior court has charged, and the judge has allowed costs clearly not sanctioned by law, the Court of Queen's Bench will punish by fine or attachment. *Rex v. Whitehead et al.*, Tay. U. C. R. 655.

Right to recover costs in causes not conducted to final issue.]—13. Attornies had been retained to conduct some causes for a client, which they carried on for a length of time, when, no further proceedings being taken, after a lapse of several years, they served their bill of costs: *Held*, that they had a right, under the circumstances, to retire from the further conduct of the causes, and to require payment of the costs already incurred. *Smith et al. v. Graham*, ii. U. C. R. 138.

Fees, when plaintiff in person.]—14. Attornies suing in person are allowed in this court fees for the same services as are allowed in like cases in England; but an attorney who is also a *barrister*, cannot tax a counsel fee to himself when he sues in person and conducts his own cause at Nisi Prius. *Smith et al. v. Graham*, ii. U. C. R. 263.

Attorney entitled to recover fees paid to counsel.]—15. An attorney is entitled to recover against his client fees paid to counsel conducting the cause at the trial. *Brock et al. v. Bond*, iii. U. C. R. 349.

Taxation.]—16. A client not having obtained a regular order for the taxation of his attorney's costs before the trial, will not be allowed, by producing the Master's allocatur at the trial, to dispute the items of his attorney's bill. *Ib.*

Court will interfere to prevent at-

tornies being unjustly deprived of costs.]—17. If after notice by the plaintiff's attorney to the defendant a bona fide settlement, or without notice a collusive settlement be made by the defendant with the plaintiff, this court, in the exercise of its equitable jurisdiction, will interfere to prevent the attorney being unjustly deprived of his costs. *Langle v. Fetterly*, v. U. C. R. 628.

Defendant, an attorney in person settling with the plaintiff after fi. fa. put in sheriff's hands.]—18. Where the defendant, an attorney, settled with the plaintiff after a fi. fa. had been put in the sheriff's hands, which the defendant must have known the plaintiff's attorney had issued almost wholly for the recovery of costs, the court ordered the amount of the plaintiff's attorney's costs included in the execution to be referred to the Master for taxation, and the defendant to pay the sum to the plaintiff's attorney, together with the costs of the application. *Griggs v. Meyers*, v. U. C. R. 532.

IV. RIGHTS, AND MISCELLANEOUS MATTERS.

See ARREST, II. 2; IV. 1.—COGNOVIT, 5.—COSTS, I(1), 7.—ESCAPE, 2.—EVIDENCE, VII. 4.—EXECUTOR ETC., I. 9.—MONEY HAD AND RECEIVED, 13.—NOTICE OF TRIAL, 12.—PRIVILEGED COMMUNICATION. WITNESS, 18, 19.—WRITS OF TRIAL ETC., 6.

Admission of solicitor of sheriff's court in Scotland.]—1. A solicitor in the sheriff's court in Scotland is not entitled to be admitted as an attorney of this court on proof of service for three years under articles in Upper Canada, under the provisions of the statute 7 Wm. IV. ch. 15. *Macara, In re*, ii. U. C. R. 114.

Acting as advocate and witness.] 2. An attorney cannot act at a trial,

both as an advocate and a witness. *Benedict v. Boulton et al.*, iv. U. C. R. 96.

[See an instance in *Cameron v. Forsyth et al.*, COUNSEL.]

Right to be heard as an advocate in the District Courts.—3. Per Macaulay, J. and Jones, J.—Attornies of this court not being barristers cannot as of right be heard as advocates in the district courts of this province. (Robinson, C. J. dissentiente). *Lapenotiere, In re*, iv. U. C. R. 492.

[The result of this decision seems to be to leave it *discretionary* with the District Court judge either to grant or refuse to attornies the privilege of practising as advocates in his court.]

Service of summons to compute, on agent.—4. The service of a summons to compute, on the agent of the defendant, an attorney, is sufficient. *Spragge v. McMartin*, Trin. Term, 1 & 2 Vic.

Account rendered by attorney, not binding on client.—5. The rendering of an account by the plaintiffs' attorney in this province, (the plaintiffs residing abroad), is not binding finally on the plaintiffs as to the mode of calculation; and even where the plaintiffs themselves, in the first instance, incorrectly state an account, they may have it legally adjusted at any time before a final settlement. *Sir James McGregor et al. v. Gaulin et al.*, iv. U. C. R. 378.

Client not bound by terms accepted by his attorney.—6. The court will not hold the defendant to terms accepted by his attorney, at the suggestion of a judge at chambers, when he immediately abandons the judge's order. *Young v. Shore*, ii. O. S. 314.

Agreement between attorney and Judge of District Court as to settling debt—Attorney absconding.—7. Where a promissory note of a judge of a district court was placed in the hands of an attorney for collection, and he agreed to give the judge credit on the note for fees payable by him for

business done in the district court, and did indorse part on the note as payment, and subsequently the whole amount was paid by such fees, but the attorney refused to credit any more than the sum first indorsed, and afterwards absconded: *Held*, in an action on the note, that the judge could not give the payment by fees in evidence against the plaintiff. *Ketchum v. Powell*, iii. O. S. 157.

Action against sheriff's sureties—Arrangement between sheriff and plaintiff's attorney.—8. Where in an action against a sheriff's sureties for money received by the sheriff on an execution at the suit of the plaintiff, it appeared that the amount had been credited to the plaintiffs' attorney in an award between him and the sheriff, and that the attorney had accepted the award—the court held, that a verdict for the defendant was right. *Hall et al. v. Hamilton*, Hil. Term, 4 Vic.

Client's right to control attorney's practice.—9. A client is not to be regarded as having a right to govern the conduct of his attorney, as to the degree of liberality he shall observe in his practice. *Shaw et al. v. Nickerson*, and *Gillespie et al. v. Nickerson*, vii. U. C. R. 541.

ATTORNEY GENERAL.

See CERTIORARI, 5.

ATTORNMENT.

See EJECTMENT, I. 3.

AUCTION AND AUCTIONEER.

See HORSE.—SET OFF, 16.

Conditions of sale—Purchaser's name, by whom to be signed—Requisites of—Signed list.—1. At an auction the conditions of sale must be annexed to the list of purchasers, so as

to make a complete contract to bind the vendee under the Statute of Frauds; but it is not necessary that the auctioneer himself should sign the purchaser's name, it may be done by his clerk at the time, and the clerk of the owner of the goods sold, acting openly at the sale for the auctioneer, is his clerk to bind the purchaser; and the signed list should shew the weight and value of the articles purchased, and the price given for them. *Sandford et al. v. O'Donohoe*, Mich. Term, 4 Vic.

[See cases 3, 8 & 9, *infra*.]

Action against an auctioneer for selling goods at a ruinous price—Evidence.—2. An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury under the circumstances find that he has acted negligently and in disregard of his duty; and it is no misdirection in such a case to tell the jury that the low price for which the goods were sold is evidence to go to them of negligence on the part of the auctioneer. *Cull v. Wakefield*, Mich. Term, 5 Vic.

Conditions—Deposit—Statute of Frauds—Re-sale—Loss—Responsibility of first purchaser.—3. Where at a sale by auction, the defendant purchased goods on the condition of furnishing indorsed notes for the amount, with the option of obtaining a discount of ten per cent. for cash, and that if the conditions were not complied with the goods were to be re-sold at the risk of the purchaser, and after the sale the defendant paid 15*l.* on account, but performed no other part of the conditions, and the plaintiff re-sold the goods at a loss: *Held*, that the part payment took the case out of the Statute of Frauds, so as to dispense with the necessity of proof of a written contract, and that such payment could not be considered as depriving the plaintiff of the right to re-sell and make the defendant responsible for the loss on the re-sale. *Furniss v. Sawers*, iii. U. C. R. 77.

[See case 5, *infra*.]

Sale without notice of revocation of auctioneer's authority.—4. If goods are sent to an auctioneer to sell, and the principal afterwards direct the auctioneer not to sell them, but the goods still remain in his possession, and are purchased bona fide by a third party, who has no notice whatever of the revocation of the auctioneer's authority, such sale is good. *Gunn v. Gillespie*, ii. U. C. R. 151.

Re-sale—Purchase of goods by partner of auctioneer.—5. Where goods were sold by auction, but not having been taken away by the purchaser, were afterwards re-sold at a loss, and were purchased by a person who was the partner of the auctioneer, though in another business totally distinct from that of auctioneer; and an action was afterwards brought by the auctioneer to recover from the first purchaser the loss on the re-sale: *Held*, that it was no good ground of objection to such action, that the goods on the re-sale had been purchased by such partner of the auctioneer. *Clarkson et al. v. Noble*, ii. U. C. R. 361.

Conditions of sale—Construction of sale as to credit and cash—Set off.—6. By an auctioneer's conditions of sale purchasers to an amount exceeding 30*l.*, were to have "six months credit, giving approved indorsed notes:" *Held per Cur.*, (Robinson, C. J., dissentiente), that a purchaser over 30*l.*, upon these terms, was a purchaser unconditionally on credit, and could not be treated as a purchaser for cash, upon his refusal to furnish the indorsed note; and as he could not consequently be sued on the common count for goods sold and delivered, until after the expiration of the credit, that to a special action brought by the auctioneer against the purchaser before the credit had expired, for not giving the indorsed note when requested, a plea of set off would be inadmissible. *Wakefield v. Gorrie*, v. U. C. R. 159.

Sale on special agreement—Plea

of another agreement.]—7. Where the conditions of a sale are stated in the declaration as being imposed *at the time of sale*, the defendant cannot be discharged from his obligation to perform them by alleging in his plea any agreement *before the sale*; the plea containing such defence is bad on general demurrer. *Mead et al. v. Hendry*, i. U. C. R. 238.

Signature of clerk sufficient to bind purchaser.]—8 The signature of the clerk of an auctioneer on behalf of a purchaser at an auction, is sufficient to charge the party purchasing within the statute. *Clarkson et al. v. Noble*, ii. U. C. R. 361.

Offer by purchaser to sell the goods to another—No acceptance.]—9 An offer by a purchaser at an auction to sell to another person the goods purchased by him is not such a dealing with the goods as constitutes an acceptance of them, to take the case out of the Statute of Frauds. *Ib.*

AUTRE ACTION.

See ABATEMENT, 7.—ONUS PROBANDI, 2.

AVERAGE.

See GENERAL AVERAGE.

AVOWRY.

See REPLEVIN.

AWARD.

See ARBITRATION AND AWARD.

AWAY-GOING CROP.

See LEASE, I. 6, 8.—TROVER, II. 4.

BAIL.

BAIL.

IN CIVIL CASES.

- I. JUSTIFICATION, DISCHARGE AND RELIEF OF.
- II. PROCEEDINGS AGAINST.
- III. BAIL-PIECE, AND OTHER MATTERS RELATING TO BAIL.

IN CRIMINAL CASES.

See CRIMINAL LAW.

- I. JUSTIFICATION, DISCHARGE, AND RELIEF OF.

Affidavit of justification, before whom sworn.]—1. The affidavit of justification of bail cannot be sworn before the defendant's attorney. *Koyle v. Wilcox*, ii. O. S. 113.

When bail can justify by affidavit made at the time of acknowledgment.] 2. Bail will be allowed to justify by the affidavit made at the time of the acknowledgment, though an exception to them be entered, where nothing is shewn to repel such affidavit nor to impeach their solvency. *Duggan v. Derrick*, Hil. Term, 6 Wm. IV.

Bail excepted to in vacation—Time to justify.]—3. Since the statute 4 Wm. IV. ch. 5, bail excepted to in vacation are compelled to justify in vacation, and have not till the following term for that purpose. *McKenzie et al. v. Macnab*, Easter Term, 2 Vic.

Surrender of principal without certificate from sheriff—Exoneretur refused.]—4. The court will not grant leave to enter an exoneretur where bail have surrendered their principal without a certificate from the sheriff to whom he was rendered. *Linley v. Cheeseman*, Dra. Rep. 55.

Time for render—On notice of render, plaintiff must stay proceedings.] 5. Bail have eight days in full term after the return of process against themselves to surrender their principal, and the plaintiff is bound to stay proceedings on receiving notice of the

render, although the costs be not paid. *Ives v. Robinson*, Mich. Term, 2 Vic.

[See next case, and 12, *infra*.]

Liability of bail for costs when render made in proper time.]—6. When bail surrender their principal within the time allowed after the return of process against themselves, they are not liable to costs. *Lewis v. McDonald*, Trin. Term, 2 & 3 Vic.

Render of principal—Stay of proceedings unconditionally.]—7. Bail surrendered their principal and gave due notice of the render within eight days after the return of process in the action against themselves on the recognizance; the plaintiffs nevertheless proceeded to judgment; the court stayed the proceedings unconditionally—that is, without exacting payment of costs up to the time of giving notice. *Wright et al. v. Tucker et al.*, vi. U. C. R. 24.

Fraudulent render.]—8. A debtor on bail to the limits comes to the sheriff's office and tells the clerk there that he wishes to surrender himself—the clerk tells him to remain in the office till he finds the sheriff or his deputy, he goes out and leaves the debtor in the office, but before he finds the sheriff and returns, the debtor absconds: *Held*, in an action brought by the assignees of the sheriff against the bail, that this being a mere pretended and fraudulent render, it could not fix the sheriff. *Kennedy et al. v. Brodie*, iv. U. C. R. 189.

Discharge by other means than surrender of principal.]—9. Where a verdict was taken for the plaintiff subject to a reference, and the time for making the award was afterwards enlarged to a period beyond the time when the plaintiff would regularly have been entitled to judgment: *Held* that the bail were not therefore entitled to an exoneretur. *Whiting v. Nicoll*, Easter Term, 3 Vic.

Discharge on the ground of laches.] 10. The court refused to allow an exon-

eretur to be entered on a bail-piece on the ground of laches, where an agreement, out of which the laches grew, had been entered into with the assent of the bail, and was such that a length of time must necessarily have elapsed before the principal could complete it. *Spencer v. Gifford*, Easter Term, 3 Vic.

Sheriff being requested to return "non est inventus" nevertheless arrests prisoner—Bail thereby discharged.]—

11. Where a sheriff is requested to return "non est inventus," he need not seek the debtor, but if he do, and arrest him, the bail are discharged; and if the debtor escape, no matter from what cause, the liability of the bail does not revive. *Read v. Hilts et al.*, iv. U. C. R. 175.

Relief after expiration of eight days in term subsequent to return of process.]—12. Bail are fixed when eight days in full term have elapsed after the return of process against themselves, and the court will not relieve them afterwards. *McPherson et al. v. Mosier*, (bail of,) ii. O. S. 491.

II. PROCEEDINGS AGAINST.

See AMENDMENT, III. 1.—COGNOVIT, 2, 3.—DISTRICT COURT, 7, 8.—ESCAPE, 22.—LIMITS, II. *passim*.—SHERIFF, IV. 1, 8.—WARRANT OF ATTORNEY.

Setting aside proceedings.]—1. It is no ground for setting aside or staying proceedings on a fi. fa. against bail, that the ca. sa. against their principal has not been returned and filed. *Hugill v. McCarthy et al.*, ii. O. S. 495.

2. Where a defendant presented himself to the sheriff in discharge of his bail before the return of the ca. sa., which had been lodged in the office merely to fix the bail, and the plaintiff nevertheless proceeded against them, the court set the proceedings aside. *Ward v. Stocking et al.*, Tay. U. C. R. 288.

Stay of proceedings.—3. Where a defendant had neglected to put in special bail upon the representation of the plaintiff that it was unnecessary, (they being about to compromise,) proceedings on the bail bond were stayed for one month, to give the defendant an opportunity to put in such bail. *Myers v. Rathburn*, Tay. U. C. R. 266.

Plea, that they did not become bail—Variance.—4. A plea by bail to an action on their recognizance that they did not become bail, concluding to the country, is bad on special demurrer; and on pleas of nul tiel record to the judgment and no ca. sa., a judgment varying in the term from that stated in the declaration, and a ca. sa. in a form of action different from that stated in the replication, constitute a fatal variance. *Burns v. Grier et al.*, Easter Term, 7 Wm. IV.

Plea, that after ca. sa. issued the plaintiff gave notice to the sheriff not to arrest their principal.—5. A plea by bail to an action on their recognizance, that after the issuing of the ca. sa. against their principal, the plaintiff gave notice to the sheriff not to arrest him, is bad on general demurrer. *Burns v. Donnelly et al.*, Easter Term, 7 Wm. IV.

Setting aside proceedings.—6. Where a defendant was arrested and gave bail below, and the bail below put in bail above, the notice of which was signed by their attorney as *defendants' attorney*, and all the subsequent papers in the cause were served on his agent, and judgment was obtained, and the defendant taken in execution, the court, on affidavit of these facts, and that the defendant had no knowledge of the proceedings, set them all aside with costs. *McMartin v. McKinnon*, Hil. Term, 6 Wm. IV.

[See also case 9, *infra*.]

Refusal to set aside proceedings, notwithstanding irregularities.—7. Where there was an irregularity both

in the special bail piece and in the notice of bail, and the plaintiffs took an assignment of the bail bond and obtained judgment and execution, the court refused to set aside the proceedings on the bail bond on payment of costs, the defendant in the original action being insolvent, and the plaintiffs having lost the opportunity of going to trial at two assizes. *Lyman et al. v. Binge*, Hil. Term, 5 Vic. P. C. McLean, J.

Declaration on recognizance against bail.—8. The plaintiff declares in debt on a recognizance of bail, and sets out in his declaration that the bail came before a commissioner of the Newcastle district, duly appointed according to the form of the statute in such case made and provided, (2 Geo. IV. ch. 1, sec. 40); and then, after stating the condition of the recognizance, make this averment, "as by the record of the said recognizance, still remaining in the court, more fully appears." *Held per Cur.*, (Macaulay, J. dissentiente,) declaration bad on special demurrer, in not averring that the recognizance *was filed in the office of the Deputy Clerk of the Crown in which it was taken*, as directed by the 40th section of the act (2 Geo. IV. ch. 1.) *Gillespie et al. v. Grant*, iii. U. C. R. 400.

Proceedings against bail without their knowledge—Interference of court.—9. Where judgment and execution have been obtained against bail by returns of "nihil" to sci. fas. without any knowledge on their part of the proceedings against them, the court, although they cannot set aside the proceedings, will interfere and let them in to a defence to the action, upon payment of costs. *Read v. Hilts et al.*, iv. U. C. R. 175.

Pleadings.—10. Debt on a recognizance of bail.—Plea, no ca. sa. Replication, setting out a ca. sa. directed to the sheriff of the Newcastle district—averring that district to be the

one in which the venue was laid, and concluding with a prayer to the court to inspect the record, and giving a day for that purpose.—Rejoinder, traversing the venue being laid in the Newcastle district, and averring it to have been laid in the Victoria district. Demurrer—1st. Because the rejoinder was a departure from the plea: 2ndly. That a perfect issue having been joined already by the replication, the defendants were precluded from adding any further pleadings: *Held*, rejoinder good. *Robertson v. Goin et al.*, v. U. C. R. 72.

Declaration.—11. *Held per Cur.*, that it is not necessary to aver, in an action brought by the assignees of a bail bond, that the sheriff did not receive the money after the assignment of the bond; neither is it necessary to aver that the defendant had notice of the assignment. *Easton et al. v. Longchamp et al.*, iii. U. C. R. 475.

Bail to be perfected before stay of proceedings.—12. Bail must not only be put in, but perfected, before moving to stay proceedings upon the bail bond on the usual terms. *Gould v. Birmingham*, iii. O. S. 298.

Stay of proceedings after delay of three years.—13. The court will stay proceedings on a bail bond, after judgment and execution, on payment of costs, where the plaintiff has delayed for three years to proceed against the bail; and they will not keep the bail to terms accepted by them, when obtaining a judge's order in vacation, where the order was abandoned afterwards, and never acted upon. *Young v. Shore*, ii. O. S. 314.

Action on bond by executrix as executrix, when bond made to her in her own right—Nonsuit.—14. Where in an action of debt on a bail bond, taken in a suit brought by an executrix, the declaration was framed shewing the cause of action to have accrued and the bond to have been given to the plaintiff as executrix, and the defen-

dant pleaded non est factum, and on the trial it appeared that the bond was given to the plaintiff in her individual right: *Held*, that she could not recover, and a non-suit was entered on leave reserved. *Haw v. Montgomery et al.*, Trin. Term, 3 & 4 Vic.

Pleadings—Evidence.—15. Debt on a recognizance of bail entered into in a district court.—Plea, that no ca. sa. had been duly sued or prosecuted out of the district court.—Replication, that the plaintiff did sue out and prosecute a ca. sa., setting it out, and praying that a day might be given to bring in the record. The record certified to this court, by the judge of the district court, agreed with the replication.—It was therefore held, that under the issue no objection could be taken to the ca. sa., as in some particulars varying from the judgment. It was also held, that it was no objection that it did not appear upon the record that the ca. sa. had lain four days in the sheriff's hands before the return day, this being matter of practice of another court, and not made the subject of inquiry upon the issue raised in this court. *Cochrane v. Eyre et al.*, vi. U. C. R. 594.

Action in outer district on record in Toronto.—16. In debt on a recognizance of bail, the declaration will be bad if it appear that the plaintiff is bringing his action in an outer district, upon a record of this court remaining in Toronto. *Manning v. Proctor et al.*, vii. U. C. R. 22.

Declaration—Filing.—17. In debt on a recognizance of bail taken in an outer district, the declaration must shew the recognizance to have been filed in the district where it was taken. *Ib.*

Averment of indorsement of ca. sa.—18. *Held*, that in an action by the assignees of a bail bond, the indorsement on a writ of ca. sa. being stated to be for a less sum than that mentioned in the judgment, is no ground of special demurrer to the declaration.

Easton et al. v. Longchamp et al.,
iii. U. C. R. 475.

III. BAIL PIECE, AND OTHER MATTERS RELATING TO BAIL.

See CLERK OF THE CROWN AND PLEAS, 1, 2.—CONSTABLE, 4.—MAGISTRATES, 8.

Bail Piece.—1. Where there are two plaintiffs with the same surname, the non-repetition of the surname after the christian name of each in a bail piece is only an irregularity, and will not warrant the plaintiffs in taking an assignment of the bail bond. *Meighan et al.*, v. *Brown*, Dra. Rep. 175.

Intituling of bail piece—Entry of.—2. A bail piece may be intituled of the term in which bail is put in, although not in the term in which the writ was returnable, and may be entered before the return day of the writ; but it should state in the margin the district in which the venue is to be laid, and if it do not, it is a nullity. *Ward v. Skinner*, iii. O. S. 163.

Amendment of bail piece, with consent of bail.—3. A bail piece may be amended in the names of either the plaintiff or the defendant, with the consent of the bail. *Daniell v. Janus*, Hil. Term, 4 Vic., P. C., Jones, J.

Charging in execution.—4. A ca. sa. lodged in a sheriff's office, to charge the bail, is not a charging in execution. *Dorman v. Rawson*, Tay. U. C. R. 357.

Attachment against sheriff standing as a security, bail being perfected.—5. Bail being perfected, the court will not order an attachment obtained against the sheriff, for not bringing in the body, to stand as a security; where, although a trial has been lost, it has been without the fault of the sheriff, and he swears the application is made for his own indemnity. *Ward v. Skinner*, iii. O. S. 235.

Allowance of bail refused, one of the bail having absconded.—6. A rule for the allowance of bail was refused, where it was shewn that since their justification one of the bail had absconded. *Billings et al. v. Loucks*, Hil. Term, 6 Wm. IV.

Enrolment of recognizance neglected till after plea of nul tiel record—Costs.—7. Where a recognizance is not enrolled until after nul tiel record pleaded, the plaintiff must pay the costs of the defendant's plea, and the defendant be at liberty to plead de novo. *Smith v. Morton*, Trin. Term, 7 Wm. IV.

Condition to render the defendant to sheriff of district in which venue not laid.—8. *Semble*: Since the statute 4 Wm. IV. ch. 5, sec. 1, a recognizance of bail, conditioned to render the defendant to a sheriff of a district in which the venue is not laid, is not void. *Billings et al. v. Barry et al.*, Easter Term, 2 Vic.

Costs paid by bail, how recoverable from principal.—9. Bail who have paid the costs of an action against themselves, cannot recover them from their principal as money paid; they must declare specially. *Shore v. Burrell*, Mich. Term, 3 Vic.

Proceedings had in district court—Application to set them aside in Queen's Bench.—10. Where an action was brought on a recognizance of bail taken in a district court, and on an application to set aside proceedings, circumstances were shewn which might have induced the court to have ordered an exoneretur to be entered on the bail piece, if the original action had been brought in this court: *Held*, that the motion could not be entertained, as the application should have been made to the court below. *Morgan v. Mosier et al.*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

Teste and return of ca. sa. to charge bail.—11. There must be fifteen days between the teste and return of a ca.

sa. to charge bail. *Ferrie v. Mingay*, Mich. Term, 5 Vic., P. C. Jones, J.

Construction of recognizance under 7 Vic. ch. 31.]—12. Under the repealed statute 7 Vic. ch. 31, the recognizance of bail was not forfeited by the non-payment of the condemnation money on the recovery of judgment, unless the alternative condition in the recognizance was not complied with. The legislature having made no provision in the act, by which the statute 7 Vic. ch. 31 was repealed, for continuing the proceedings commenced under the repealed statute, no proceeding can now be taken against bail under such recognizance. *Harday v. Hall et al.*, ii. U. C. R. 276.

Setting aside recognizance roll.]—13. This court will set aside a recognizance roll not warranted by the proceedings, after comperuit ad diem pleaded to an action on the bail bond. *McDonell v. Rutter*, ii. O. S. 340.

BAIL-PIECE.

See BAIL, III.

BAILIFF.

See DISTRESS, I. 11. — DIVISION COURT, 2, 3.—ESCAPE, 20.—SHERIFF, IV. 7.—TRESPASS, I. 15.

Notice of action.]—1. The statement of a bailiff, that "he believed the cattle to be the plaintiff's," when he seized them in execution against the person in whose possession they were, does not divest him of the character of bailiff, so as to make it unnecessary to serve him with notice of action. (Jones, J. dissentiente.) *Sanderson v. Coleman*, iv. U. C. R. 119.

Evidence by, under plea of not guilty.]—2. Under the plea of not guilty, a bailiff can only prove that he

was not guilty of the negligence.—He cannot give in evidence any special contract of service. *Ruttan v. Shea*, v. U. C. R. 210.

False swearing to service of summons by bailiff—Remedy.]—3. An action on the case was held to be maintainable against a bailiff of a court of requests for falsely swearing to the service of a summons, which had not been served, whereby judgment was given against the plaintiff; and the common law remedy is not taken away by the action given against the bailiff on his covenant, under the Court of Requests Act. *Cline v. McDonald*, Easter Term, 2 Vic.

BAILMENT.

Case for injury to a horse—Plea of hire.]—1. Where the plaintiff declared in case, charging the defendant with taking his mare on loan, and averring a breach of duty in not using her in a proper and careful manner, whereby she was injured and died, and the defendant pleaded that he obtained the mare from the plaintiff on a contract for hire, and not on loan; the plea was held a good answer. *Robertson v. Brown*, i. U. C. R. 345.

[A person who rides a horse gratuitously at the owner's request, if he be skilled in horses, is as much liable as a borrower, for any injury sustained by the horse whilst ridden by him, *Wilson v. Brett*, xi. M. & W. 113.]

Assumpsit—Plea to part of breach.]—2. Where in assumpsit by the plaintiff for the immoderate riding of a mare loaned to the defendant, and not returning her, with a breach that she was not restored to the plaintiff, but was so greatly injured that she died; the defendant pleaded one plea as to returning her only, to which the plaintiff demurred: the plea was held a good answer to that part of the breach it professed to cover. *Campbell v. Boulton*, ii. U. C. R. 202.

Assumpsit—Argumentative and other defective pleas.—3. Special assumpsit against a bailee for killing a horse lent to him by careless and inconsiderate driving, and breaking the buggy and harness, and not returning them.—3rd plea, that the horse was a runaway horse, and that the damage was occasioned thereby.—4th plea, that the plaintiff hired the horse knowing him to be a runaway, and that the horse ran away without the default of the defendant.—5th plea, that the defendant did offer to return the buggy and harness, but in the broken state they were in after the runaway.—Demurrer to 3rd, 4th and 5th pleas: *Held*, pleas bad. *McKay v. Cameron*, vi. U. C. R. 257.

BANK OF BRITISH NORTH AMERICA.

See CORPORATION, 9.

1. The Bank of British North America is entitled to sue in Upper Canada in its corporate name. *Bank of British North America v. Brown*, vi. U. C. R. 490.

Action against manager.—2. An action is not maintainable against the manager of the Bank of British North America, under 7 Wm. IV. ch. 34, in his individual character, for a cause of action which has accrued against him only as a manager of the Bank. *White v. Hunter*, Easter Term, 4 Vic.

BANK OF UPPER CANADA.

See CORPORATION, 1.

Right of president to vote by proxy at election of bank directors.—1. The president of the Bank of Upper Canada, not being an officer of the Bank, within the meaning of the 16th clause of the Bank Act, 6 Vic. ch. 27, is not prohibited from voting by proxy at the

annual election of the Bank directors. *Regina v. The Bank of Upper Canada*, v. U. C. R. 338.

Semble.—2. That if the restriction had applied to the president, and he had nevertheless voted by proxy, the court, though they might possibly have interfered by issuing a quo warranto, would certainly not have directed a mandamus for a new election in the first instance. *Ib.*

Power to hold vessels for any purposes.—3. The Bank of Upper Canada by their amended charter 6 Vic. ch. 27, sec. 19, are disabled from holding ships or vessels for any purpose whatever, whether as security for pre-existing debts, or for present advances. *McDonnell et al. v. The Bank of Upper Canada*, vii. U. C. R. 252.

[This disability has been since removed by act of Parliament.]

Power to take mortgages upon real estate.—4. *Semble*: That the Bank of Upper Canada may take mortgages upon real estate, in order to secure debts previously contracted. *Ib.*

BANKRUPT AND BANKRUPTCY.

See BILLS OF EXCHANGE ETC., VI. 7. CASE, (ACTION ON THE), 7.—ESTOPPEL, 6.—FRAUDULENT DEED ETC., passim.—JUDGMENT, 12.—SHERIFF, I. 10.—TROVER, II. 3.

Certificate in Lower Canada, a release in Upper Canada.—1. Under the Bankruptcy Act, 7 Vic. ch. 10, sec. 74, a person having obtained his certificate of discharge in bankruptcy, under the ordinance passed in Lower Canada, is discharged from his debts in Upper Canada, which were provable under the Lower Canada commission. *McDonald et al. v. Dickenson*, i. U. C. R. 15.

[The certificate is no bar to the recovery of rent, *Newton v. Scott*, ix. M. & W. 434, upheld in x. M. & W. 474. See a further case, 9 infra.]

Cognovit given in contemplation of bankruptcy.—2. Giving a confession of judgment, payable immediately, for a sum which is justly due to a creditor who has pressed for payment, there being other creditors, is not a voluntary and fraudulent procuring of the debtor's goods to be taken in execution in contemplation of bankruptcy, within the meaning of the Bankruptcy Act, 7 Vic. ch. 10. *Beekman v. Workman et al.*, i. U. C. R. 531.

3. A cognovit given, in the opinion of a jury, by a bankrupt in contemplation of bankruptcy, and for the purpose of giving to the defendant a preference or priority over his other creditors, is a security within the 19th clause of the bankrupt law, and therefore void. *Brent v. Perry*, vii. U. C. R. 24.

[See form of a plea of a confession being thus given, case 5, *infra*.]

Bankruptcy Act, 7 Vic. ch. 10, sec. 37—Seizure and levy under.—4. The seizure and levy in execution under the Bankruptcy Act, 7 Vic. ch. 10, sec. 37, to avoid the effect of a commission of bankruptcy subsequently issued, mean only the seizure of the goods, and not the actual levying of the money thereout. *Hales v. Tracy*, i. U. C. R. 541.

Fraudulent confession of judgment how pleaded.—5. A confession of judgment stated in the pleadings to have been given "in contemplation of bankruptcy, and for the purpose of giving one of several creditors a preference, and with the intent to delay and defeat other creditors," is well pleaded, without further adding that it was given within a month of the issuing of the commission against the bankrupt. *Brent v. Perry*, v. U. C. R. 538.

Imperial Statute 6 Geo. IV. ch. 16, sec. 108.—6. Under the 75th clause of our Bankruptcy Act, the 108th section of the British Statute 6 Geo. IV. ch. 16, is not in force in

Upper Canada. *Maulson v. The Commercial Bank, M. D.*, ii. U. C. R. 338.

Seizure under execution before commission issued.—7. If a seizure be made under execution without notice of a prior act of bankruptcy, before the issuing of a commission of bankruptcy, the sheriff may proceed and sell, and pay over the proceeds of sale to the execution creditor, though the commission be placed in his hands before sale. *Ib.*

8. When a party had confessed judgment to a banking institution before the passing of the bankrupt law, with the understanding that it would not be enforced so long as he continued to pay to the plaintiff a certain sum every fortnight, and it was subsequently agreed after several payments, that the confession should stand also as a security for notes to be discounted for the party, and proceedings having been threatened against him by other creditors, the bank issued execution upon the judgment and sold: *Held*, that the assignees of the bankrupt, on a commission issued after the seizure, but before the sale, could not recover the proceeds in an action for money had and received against the bank. *Ib.*

Bankrupt let in to plead certificate puis darrein continuance after interlocutory judgment—Staying execution.—9. Though a certificate of bankruptcy be no discharge to the bankrupt till it be confirmed, an interlocutory judgment entered up against him before the confirmation will be set aside to allow him to plead his certificate by way of puis darrein continuance, and if he omit to make such application, the court will still relieve him by staying the execution of the fi. fa. on a proper application being made, after judgment shall have been obtained and execution issued. *Commercial Bank v. Culross et al.*, iii. U. C. R. 176.

Execution—Commission—Priority of writs.—10. A fi. fa. at the suit of an execution creditor, placed in the sheriff's hands before a commission of bankruptcy against the debtor be sealed, but *on the same day* on which it was completed and delivered to the sheriff, has priority over the commission. *Beekman v. Jarvis*, iii. U. C. R. 280.

Assignment of property.—11. An assignment of property made bona fide by a person about to become a bankrupt, to one of his creditors, thirty days before the commission of bankruptcy issued, is good, if it be made without the knowledge on the part of the creditor of any act of bankruptcy having been committed, or that bankruptcy was in contemplation. *Armour v. Phillips*, iv. U. C. R. 152.

[See *Kerr v. Coleman*, infra, 16.]

Action by bankrupt commenced before bankruptcy.—12. Where a plaintiff commences an action, and pending the proceedings becomes a bankrupt, he may under our Bankruptcy Act, 7 Vic. ch. 10, secs. 31 & 32, continue the suit in his own name, unless the assignees intervene and desire to be made plaintiffs in his stead. *Ireland v. Wagstaff et al.*, iv. U. C. R. 231.

[A bankrupt who has not obtained his certificate, may acquire property and sue, unless the assignees interfere. *Herbert v. Sayer*, 5 Q. B. 965.]

Notice of act of bankruptcy to execution creditor.—13. A notice in general terms to the execution creditor, before the sheriff could have levied under his execution, of the defendant's having committed an act of bankruptcy, (without specifying any particular act of bankruptcy,) is sufficient to protect the debtor's property for the benefit of all his creditors. *French v. Kingsmill*, v. U. C. R. 30..

14. Notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of its filing, provided a commission shall

issue upon it within two months, and provided that the execution creditor or his attorney was aware of the fact before suing out execution. *Ib.*

15. Deed of assignment by bankrupt to one of his creditors, with a right of preference—annexing of schedule to deed—assignment on the face of the instrument of all bankrupt's estate to one creditor, an act of bankruptcy per se. *Kerr v. Coleman*, vi. U. C. R. 218.

[*Quære*: Anything short of this such an act? *Ib.*]

16. Construction of our Bankruptcy Act, 7 Vic. ch. 10, clauses 2 & 19, also of proviso to clause 19, and also of clauses 37 & 38, as also as to the necessity the act imposes upon the assignee of a bankrupt seeking to invalidate an assignment to a particular creditor, being required to prove that the assignment was *voluntary*, in addition to its being made by the bankrupt in contemplation of bankruptcy, with the knowledge of the creditor, and for the purpose of a preference. *Ib.*

17. *Semble*: That a jury finding "that the assignment was executed in contemplation of bankruptcy, and that the defendant knew when he took it that the other creditors would not be paid their debts," is sufficient to satisfy the act, and makes void the assignment, without any specific direction from the judge or finding by the jury, upon the further point of the assignment being the voluntary act of the bankrupt. (Sullivan, J. dissentiente.) *Ib.*

Plea of bankruptcy.—18. *Held*, that the following general plea of bankruptcy, "that after the making of the promise, and after the action had accrued, he became a bankrupt," without averring that he became a bankrupt before action brought, or that he had obtained a certificate, was good on special demurrer. *Short v. McMullen*, vi. U. C. R. 407.

BANKS AND BANKING.

See BANK OF BRITISH NORTH AMERICA.—BANK OF UPPER CANADA.—BUBBLE ACTS.—CORPORATION, 1, 3.—JOINT STOCK COMPANY, 1.—MANDAMUS, 6.—MONEY HAD AND RECEIVED, 9, 10.—WITNESS, 12.

BARGAIN AND SALE.

See DEED.

BARON AND FEME.

See HUSBAND AND WIFE.

BARRISTER.

See COUNSEL.

BATTERY.

See ASSAULT AND BATTERY.

BEGIN (RIGHT TO).

See APPEAL, 3.—ONUS PROBANDI.

BILLIARD TABLES.

Right of the City of Toronto to suppress.]—1. *Semble*: That the Corporation of the City of Toronto has a right to suppress all Billiard Tables within its jurisdiction. *Rex v. Inspector of Licenses, Home District*, iv. O. S. 9.

Duty imposed on, by Town of London, under act of incorporation—Its effect on provincial duty.]—2. *Held*, that a by-law of the Corporation of London, passed under the authority of the statute 10 & 11 Vic. ch. 48, and providing that the owner of a billiard table shall pay 10*l.* per annum for a license to keep the same had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III. ch. 6, but must be

considered as a regulation super-added for the purposes of the Town of London. *Church qui tam v. Richards*, vi. U. C. R. 562.

Recovery of penalty under 50 Geo. III. ch. 6.]—3. *Held*, that an action of debt would lie for the penalty, under 50 Geo. III. ch. 6. *Ib.*

Averments in declaration.]—4. *Held also*, that in an action for the penalty, it need not be averred that the defendant had not paid the penalty: *Also*, that it need not be averred in the declaration that the defendant kept the table without having first obtained a license from the inspector of licenses; that he did so without having first obtained a license is sufficient: *Also*, that it need not be averred that the offence was committed after 29th September 1810. *Ib.*

5. *Semble*: That the statute 3 Vic. ch. 9, sec. 9, and 3 Vic. ch. 20, sec. 10, do not apply to any person merely setting up and keeping a billiard table for hire, and not being at the same time a keeper of an inn or a house of public entertainment. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See STOCK NOTES.

- I. FORM AND CONSTRUCTION GENERALLY.
- II. PRESENTMENT AND ACCEPTANCE.
- III. PROTEST AND NOTICE OF DISHONOR.
- IV. TRANSFER BY INDORSEMENT.
- V. ACTION, PLEADINGS AND EVIDENCE.
- VI. CONSIDERATION, AS A GROUND OF DEFENCE.
- VII. OTHER GROUNDS OF DEFENCE.
- VIII. MISCELLANEOUS MATTERS.

I. FORM AND CONSTRUCTION GENERALLY.

See KINGSTON MARINE RAILWAY COMPANY, 3.—PARTNERS ETC., 5, 6, 7.—USURY, 1, 3, 5, 10.

The following instrument, a promissory note.—1. Held, that the following instrument, “Yonge Street, 29 April 1839.—Seventeen months after date, I promise to pay to Mr. John Hogg or order, the sum of 50*l.* without interest, or three years and five months after date, with two years interest, for value received,” is a valid promissory note. *Hogg v. Marsh*, v. U. C. R. 319.

Making of note.—2. A note signed “A. & Co., by A. jun.,” prima facie imports that A. signs the note for the firm, and not as one of the firm. *Dowling v. Eastwood et al.*, iii. U. C. R. 376.

Parol evidence to alter bill.—3. Parol evidence cannot be received to shew that a bill of exchange accepted, payable three days after sight, was not to be paid till a further time had elapsed. *Bradbury v. Oliver*, Hil. Term, 2 Vic.

[See also cases 4 and 6, *infra*.]

Parol evidence—When admissible.—4. Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified. *Davis v. McSherry*, vii. U. C. R. 490.

Note for debt of third party.—5. A promissory note given by A. to B. for a debt due by C., upon a consideration of forbearance, and upon no privity shewn between A. and C., cannot be enforced. *McGillivray v. Keefer*, iv. U. C. R. 456.

Parol agreement altering the terms of note.—6. The maker of note absolute in its terms to pay the whole amount at maturity, will not be allowed

to set up the defence of an alleged parol agreement on the part of the holder to renew the note upon being paid half the amount. *Hayes v. Davis*, vi. U. C. R. 396.

Indorsement on note—Right of action affected thereby—Account stated.—7. Held, that the following instrument—“Ten days after date, we promise to pay M. Newhorn the sum of 85*l.* 15*s.*, for value received,” upon which was indorsed at the time the note was given the following memorandum: “It is agreed that this note is to be paid by a lawful mortgage, with interest on the same, having three months to run,”—could not be sued upon as a note between the original parties, and could not be given as evidence under the count on an account stated. *Newhorn v. Lawrence et al.*, v. U. C. R. 359.

Quære.—8. Would it be a note in the hands of an indorsee, who took it as a note for value? *Ib.*

Contemporaneous oral contract.—9. Where a man draws a bill of exchange to pay a debt, he cannot set up as a defence to an action brought by the indorsee of such bill, that the bill was given upon a prior verbal understanding between himself and the indorsee that the drawers would not pay unless they chose, and that in that event he was not to be liable as drawer. *Adams v. Thomas*, vii. U. C. R. 249.

[See division VII of this title, *passim*.]

Note made payable to order.—10. A note made payable to a person or his order, or to the order of a person, means the same thing, and may be sued upon stating it either way. *Myers v. Wilkins*, vi. U. C. R. 421.

Payable to order of the plaintiff.—11. Where a note is drawn payable “to the order of the plaintiff,” it need not be indorsed by the plaintiff to himself to give it the effect of a note payable to the plaintiff. *Ib.*

Note payable to the maker's own order.—12. Held, that the following note—"Four months after date, I promise to pay to my own order, at the office of the Commercial Bank here, 23l. 16s. 2d. for value received," and indorsed by the maker, could not be declared upon as a note payable to the plaintiff or bearer.

Semble: That a note in this form when indorsed by the maker, becomes a note payable generally to bearer, but not to any particular person. *Burns et al. v. Harper*, vi. U. C. R. 509.

[An instrument of this kind was held not to be a promissory note within stat. 3 & 4 Anne ch. 9. sec. 1, *Flight v. Maclean*, xvi. M. & W. 51; but contra, *Wood v. Mutton*, 16 L.J., Q. B. 446; 11 Jur. 967.]

Indorser in blank declared against as maker.—13. A note made by A. payable to B. or order, and indorsed by C. in blank, cannot be declared upon by B. as a note made by C. to him, the plaintiff B. *Wilcox et al. v. Tinning et al.*, vii. U. C. R. 372.

Cancellation of original by renewal.—14. Where a note when over due, has been returned and settled by the substitution of a renewal note, the original note is cancelled, and cannot be put in circulation again even by the payee, who has taken up the renewal note out of his own funds. (Jones, J. dissentiente.) *Cuvillier et al. v. Fraser*, v. U. C. R. 152.

Satisfaction of debt by one of two joint debtors.—15. The note of one of two joint debtors is no satisfaction of the debt. *Leonard v. Atcheson et al.*, vii. U. C. R. 32.

Note payable with interest.—16. Interest made payable by a promissory note is part of the debt, and not merely damages for detaining the debt. *Crouse v. Park*, iii. U. C. R. 458.

Parol evidence to alter note—Statute of Frauds, 4th section.—17. Evidence of a verbal agreement, to allow lands to be set off against the

amount of a note, held to be inadmissible. *McCollum v. Jones*, Tay. U. C. R. 611.

II. PRESENTMENT AND ACCEPTANCE.

See divs. IV. 16; V. 4, 5.

Necessity of presentment generally.

A promissory note made payable at a particular place must be presented there the day it falls due, or the holder cannot recover. *Truscott et al. v. Lagourge*, Easter Term, 6 Wm. IV.

It must be presented, although the maker has no funds at the particular place; but as between the payee and the maker, presentment there at any time before action brought will be sufficient, if there were no funds at the day. *Henry et al. v. McDonell*, Hil. Term, 3 Vic.

Note payable at a particular place, no averment of presentment—Promise to pay.—1. Where a note was made payable at a particular place, although no averment of its being presented there for payment appeared upon the record—the court, after verdict for the plaintiff and proof at the trial of a subsequent promise, refused a non-suit. *M^r Iver et al. v. M^r Farlane*, Tay. U. C. R. 142.

[Also see cases 2, 4, 5, infra. Although a subsequent promise is in itself evidence of presentment, such promise is not evidence of due notice of dishonor, *Burgh v. Legge*, v. M. & W. 418.]

Presentment of bill payable after date before due.—2. It is not necessary to present a bill of exchange, drawn payable after date, for acceptance before it be due; and where there has been no presentment at all, a promise to pay the amount of the bill will not be sufficient to charge the drawer, unless it be made by him with a knowledge of his default. *Richardson et al. v. Daniels et al.*, Mich. Term, 2 Vic.

[Such promise however is prima facie evidence of presentment on an issue of that fact,

Crocon v. Worthen, v. M. & W. 5.—See also div. iii. 7, *infra*.]

Presentment of bill payable in foreign country.—3. Where a bill of exchange is made payable at a particular place in a foreign country, and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by the law as it exists here. *Buffalo Bank v. Truscott et al.*, Mich. Term, 2 Vic.

Non-presentment of joint note—Promise to pay by one of the makers.—4. Where a joint note was made payable at a particular place, and it was not shewn that it was presented there when it became due, but one of the makers afterwards promised to pay it: *Held*, that that was sufficient evidence of presentment to go to the jury, and they having found for the plaintiff, the court refused to enter a non-suit on the leave reserved. *Macaulay v. McFarlane*, Trin. Term, 3 & 4 Vic.

Waiver of neglect in presentment.—5. Where the defendant, an absconding debtor, on the day a note became due, wrote to the plaintiffs stating his inability to pay, and requesting further time—the court held this rendered presentment unnecessary, although the note was payable at a particular place. *McDonnell et al. v. Lowry*, iii. O. S. 302.

[See div. III. 23 *infra*.]

Personal liability of acceptor on bill.—6. *Held*, upon the following bill and acceptance:—

“*Montreal, July 9th, 1847.*

“£225 18 1.

“Three months after date pay to the order of Alexander Simpson, Esq., Cashier of the Bank of Montreal, two hundred and twenty-five pounds eighteen shillings and one penny, currency, for value received.

(Signed,)

The Coal Brook Dale Co.
per Phillip Holland.

“To P. C. DeLatre, Esq., President Niagara Dock and Harbor Company, Niagara, C. W.”

The bill was accepted thus, in writing:—

“Accepted, payable at the office of the Bank of Upper Canada, Niagara.

(Signed,) P. C. DeLatre,
Pres't. N. H. & D. Co.”

that in an action brought by the payees (the Montreal Bank) against the acceptor personally, that the acceptor had rendered himself personally liable upon the bill. *The Bank of Montreal v. DeLatre*, v. U.C.R. 362.

7. *Quære*: Supposing the drawer had been suing the acceptor, would that have made a difference as to the acceptor's personal liability? *Ib.*

Admission of an agent's power to draw a bill—Estoppel.—8. Where a bill of exchange is drawn by a person signing as agent of a company, upon a defendant, who accepts the bill, the acceptance admits the signature of the agent, and his authority from the company to draw the bill; it also precludes the setting up of any local technical objections in regard to the composition or description of the company, or their ability to draw the bill. *Ib.*

Accommodation.—9. Where the plaintiffs, who were bankers, requested the defendant to draw two bills on England for their accommodation, which he did, and the plaintiffs indorsed and sold them here, giving the defendant a draft of the same amount payable in England, to meet them when due, and the defendant for that purpose transmitted the draft to the drawee of the bills, an officer in the customs, by whom it was discounted before it became due, and the money placed by him with the public monies left in his charge, from whence part of it was stolen; and in consequence, one of the defendant's bills came back protested, and was paid by the plaintiffs: *Held*, that although it was an accommodation transaction, the drawee was the agent

of the defendant, and not of the plaintiffs, and that the defendant was responsible to them for the amount of the bill. *Truscott et al. v. Billings*, Trin. Term, 1 & 2 Vic.

Proof of presentment before action brought against guarantee.]—10. Where the defendant had guaranteed certain advances of goods and money, to be made to A. by the plaintiff, and the plaintiff took the note of A. payable at a particular place, for the amount: *Held*, that he could maintain an action against the defendant, without proving presentment there and notice of non-payment to the defendant; and proving that there were no funds there, was not sufficient to charge the guarantee. *Driggs v. Waite*, Hil. Term, 6 Vic.

Sufficiency of presentment of a note payable at a particular place, the words "and not elsewhere" being omitted.]—11. On a note payable at a particular place, without the words "and not elsewhere," it is sufficient to charge the indorser to present it either at the place named, or to the maker himself. *Commercial Bank v. Johnston*, li. U. C. R. 126.

Presentment to maker—Statute 12 Vic. ch. 22.]—12. The statute 12 Vic. ch. 22, respecting the presentment to the makers of notes on inland bills of exchange, &c., &c., does not apply to Upper Canada. *Ridout et al. v. Manning et al.*, vii. U. C. R. 35.

Foreign bill—Laches in presentment and in giving notice of non-payment.]—13. A bill of exchange drawn in Toronto on the 6th August, 1849, by a party dealing in bills, upon a party living in New York, payable at sight, in favor of a party living in the State of Illinois, to be sent there as a remittance and for circulation, was presented in New York on the 10th November following: *Held per Cur.*, that the delay in presenting the bill to the drawee in New York, could not, under the circumstances, be held to be laches

on the part of the holder: *Held also*, that the notice to the drawer from the holder living in Illinois, through his agent living in this province, of the bill being unpaid, by the latter calling upon him with the bill on the 24th December, the bill having been presented in New York on the 19th November, could not be considered, under the facts of the case, as laches on the part of the holder in giving due notice of non-payment. *Boyes v. Joseph*, vii. U. C. R. 505.

Note falling due on Christmas day, being a Monday.]—14. A promissory note which falls due on a Christmas day, being a Monday, must be presented for payment on the preceding Saturday. *Holmes v. Ward*, Trin Term, 1 & 2 Vic.

III. PROTEST AND NOTICE OF DISHONOR.

See divs. II. 13, (latter part); V. 18. NOTARY, 1, 2.—WITNESS, 13.

Seal to protest.]—1. *Semble*: That a seal is not necessary to a protest. *Goldie v. Maxwell*, Hil. Term, 4 Vic.

Evidence of non-acceptance of bill—Post mark.]—2. A notice that a foreign bill has been returned protested, is a sufficient notice of non-acceptance, and it is not necessary to send a copy of the protest with the notice; and a foreign post-mark on a letter is *prima facie* evidence of the time when the letter was mailed. *O'Neill v. Perrin*, Mich. Term, 3 Vic.

[Still the post-mark is not *conclusive* evidence—*Stocken v. Collier*, vii. M. & W. 515; and if the post-mark be given in evidence, it should be proved by persons from the post-office, or by persons who are in the habit of receiving letters therefrom. *Woodcock v. Holdsworth*, xvi. M. & W. 124.]

Inland note—When to be protested.]—3. A promissory note made in Upper Canada, payable at Montreal in Lower Canada, is an inland note, being in effect payable generally under our statute 7 Wm. IV. ch. 5, and may be

properly protested the day after the third day of grace. *Bradbury v. Doole*, i. U. C. R. 442.

[See cases 13, 14, 18 and 19, *infra*.]

Necessity of averring notice in declaration.—4. In a declaration against the drawee of a bill, notice of dishonor must be averred, and if to excuse such a notice, want of effects be averred, it must be shewn that there were no effects from the time of drawing the bill and notice must also be averred where the defendant is only a guarantee for the bill. *Goldie v. Maxwell*, Hil. Term, 4 Vic.

Proof of.—5. Notice of dishonor of a foreign bill of exchange is not proved by producing the protest of the bill in which the notary certifies that he has given the parties notice, as it is no part of the notary's duty to give notice of dishonor. *Ewing et al. v. Cameron*, Trin. Term, 7 Vic.

[But see *Smith et al. v. Hall*, 18, *infra*. Nor is such notice proved by a subsequent promise to pay. *Bingh v. Legge*, v. M. & W. 418. See however *Bank of British North America v. Ross*, *infra* 7, which decides that such promise may dispense with the notice.]

Sufficiency of delivery.—6. A letter giving notice of the dishonor of a bill, though from misdirection it has not reached its destination so soon as it otherwise would have done, is nevertheless a sufficient notice, if being posted sooner than was necessary, it has in fact been received within the period allowed by law for giving notice of dishonor. *Bank of British North America v. Ross*, i. U. C. R. 199.

Subsequent unconditional promise, with knowledge of laches.—7. And where no evidence has been given of notice of dishonor, and there has been a subsequent unconditional promise to pay, with a knowledge of a default on the part of the holder, the evidence of notice is dispensed with.—A promise to pay after dishonor and knowledge of laches on the part of the holder, is evidence to support the averment in

the declaration that due notice of dishonor had been given. *Ib.*

Delivery to servant of indorser.—

8. Delivering notice of non-payment to an indorser by leaving it with an out-door servant cutting fire-wood, not known, and proved to have been an inmate in the indorser's family, is sufficient.—It will be a question of fact however, for the jury to determine, whether the subsequent conduct of the indorser shews him to have received the notice in due time, and where the jury finds for the plaintiff, though the judge's charge may be against the finding, the court will not set aside the verdict if the indorser file no affidavit denying that he had notice. *Commercial Bank v. Weller*, v. U. C. R. 543.

[See cases 9, 15, 21 and 24, *infra*.]

Address of notice to indorser—“York township generally”—*Sufficiency of.*—9. Held, that a notice of non-payment of a note sent to an indorser through the post-office, addressed to him in “York township,” in which he resided, was sufficient, there being no evidence as to whether there was one or more post-offices in that township, nor any proof that a letter for any other person would have been usually addressed in a different manner, or ought, in the common course of things, to have been directed to any certain post-office in the township, or in any other township near him. *Bank of Upper Canada v. Bloor*, v. U. C. R. 619.

[See *Woodcock v. Holdsworth*, xvi. M. & W. 124, in which the address was “London” generally.]

Sufficiency of, on a Sunday.—10. Held per Cur., affirming the judgment of the court below, that the following notice of non-payment of a note:—

“London, Nov. 22, 1846.

“Sir: The promissory note of Peter Bowen for twenty pounds, at three months from the 19th of August 1846, on which you are indorser, is due this day, unpaid. I therefore give you no-

vice that as the holder of the said note, I look to you for payment thereof:

Your most obedient servant,
Warren Blinn"—

given to the indorser of the following note:—

"London, 14 August, 1846.

"Three months after date for value received, I promise to pay to Thomas C. Dixon or order, at the office of Warren Blinn, Esq., in London, the sum of twenty pounds currency:

F. P. Bowen"—

was a sufficient notice to bind the indorser, without stating that the note had been presented for payment, or dishonored: *Held also*, that the notice being dated on a *Sunday*, (the note falling due on the Saturday, and the notice being delivered on the Monday,) was no objection to the validity of the notice. *Blinn v. Dixon*, v. U. C. R. 582.

Several indorsers—When notice to one notice to all.—11. Where a note is made payable to, and indorsed by several persons not in co-partnership, notice to one is notice to all. *The Bank of Michigan v. Gray et al.*, i. U. C. R. 422.

Requisites of notice.—12. A notice of dishonor to the indorser of a promissory note must, either in express terms or by necessary intendment, shew that the note has been presented for payment, and that payment has been refused. *The Bank of Upper Canada v. Street et al.*, Mich. Term, 5 Vic.

[But it need not in terms inform the party to whom it is given that the party giving it looks to him for payment. *Miers v. Brown*, xi. M. & W. 372.]

When note drawn and payable in Lower Canada—13. In an action on a promissory note drawn and made payable in Lower Canada, the law of Lower Canada must govern, in regard to the sufficiency of the notice of non-payment by the maker, to charge the

indorser. *City Bank v. Ley*, i. U. C. R. 192.

14. Where a bill is drawn and indorsed in Upper Canada, but made payable in Lower Canada, the law of Lower Canada is to govern the time within which notices may be sent. *Mathewson v. Carman*, i. U. C. R. 259.

[And see cases 18 and 19, *infra*.]

Delivery of.—15. In order to charge the indorser of a promissory note, it is not necessary that the holder should prove the notice to have been absolutely received.—If he shew that due diligence has been used in putting a letter into the post-office, though the post miscarry, that is sufficient. The fact that there is a post-office in the township in which the indorser resides does not make it incumbent on the holder to direct his notice to that office if there be a nearer office in the adjoining township to which the indorser's letters are generally sent. *The Bank of Upper Canada v. Smith*, iii. U. C. R. 358.

[See case 21, *infra*.]

Sufficiency of.—16. The following notice of dishonor was held to be insufficient, the note having been indorsed by the defendant in his own name, and not in the name of the partners to whom the notice was addressed, although the defendant was one of the firm:

"Messrs. P. M. Grover & Co.

"Gentlemen: Take notice that the promissory note of J. R. Benson for 46*l.* 0*s.* 11*d.*, on which you are indorsers, due this day, remains unpaid. Therefore the holders look to you for payment thereof, as such indorsers." *The Bank of Montreal v. Grover*, iii. U. C. R. 27.

Sufficiency of.—17. The following notice of dishonor was held sufficient:

"Sir: The note of A. B. for 50*l.* at ninety days from the 20th January 1841, indorsed by you and due this

day, remains unpaid. You are therefore hereby notified that the bank looks to you for payment.

Yours, &c

"To Mr. J. Street. For the Cashier."
The Bank of Upper Canada v. Street,
iii. U. C. R. 29.

Evidence of notice.—18. The certificate of a notary in Lower Canada at the foot of the protest, that he had put a notice into the post addressed to the indorser, is evidence of that fact under the statute 7 Vic. ch. 4. sec. 2. *Smith et al. v. Hall*, iii. U. C. R. 315.

Indorser resident in Upper Canada—Note payable in Lower Canada.—

19. The law of Lower Canada with respect to giving notice, is to govern where the note is made payable and presented there, though the indorser reside in Upper Canada. *Ib.*

20. Due notice must be averred. *Commercial Bank v. Cameron; Idem v. Culver*, iii. U. C. R. 363.

Delivery to residents in Toronto.—21. A notice of the non-payment of a bill or note, when deposited in the post-office of the city of Toronto for any indorser residing there, is as good a notice as if it had been left at the indorser's residence by a special messenger. *Commercial Bank v. Eccles*, iv. U. C. R. 336.

Sufficiency of, a question of law.—22. What is a sufficient notice of the dishonor of a bill or note, when the facts are undisputed, is a question of law. *The Bank of Upper Canada v. Smith*, iv. U. C. R. 483.

Dispensation of.—23. Whenever the indorser of a note writes to the holder for the purpose of inducing him to believe it unnecessary to give him the regular notice of non-payment by the maker—especially where he states the maker to be insolvent, such a letter, though written before the note has arrived at maturity, will be construed

by the court as a dispensation of notice. *Beckett v. Cornish*, iv. U. C. R. 138.

[This dispensation must be averred in the declaration. *Burgh v. Legge*, v. M. & W. 418. It is not evidence of the count upon an account stated. *Ib.*

Actual delivery of notice instead of posting it.—24. It is sufficient if the indorser on the promissory note receive notice of dishonor, in the same time as he would have received it by post, although the notice was sent to him by private hand, and might have been delivered a day sooner. *Nassau v. O'Reilly*, Hil. Term, 2 Vic.

Action against indorser—Promise to pay, there having been no notice.—25. Where in an action against an indorser of a promissory note no notice of dishonor was proved, but it was sworn that the defendant had asked for time, and promised to pay, although he said at the same time that he had received no notice, and the jury found for the defendant—the court refused to disturb the verdict. *Bank of Upper Canada v. Corby*, Mich. Term, 5 Wm. IV.

IV. TRANSFER BY INDORSEMENT.

See div. I. 13.—ESTOPPEL, 7.

Indorsement to trustees, without naming them.—1. An indorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain on shewing who they are, and that they act in that capacity, to vest the note in them, so as to give their indorsee the right of suing upon it. *Auldjo v. McDougall*, iii. O. S. 199.

Indorsement in blank to partners—Non-joinder.—2. Where three partners of a firm, consisting of four persons, declared on a bill of exchange as indorsees, and averred an indorsement to themselves trading under the partnership name, and the bill was indorsed in blank: *Held*, that the non-joinder of the other partner was not a

ground of non-suit, as the bill, being indorsed in blank, might be sued upon by any parties who choose to join in the action. *Anderson et al. v. Macaulay*, Easter Term, 7 Vic.

Averment of indorsement by partners, without stating their christian names—F frivolous demurrer.—3. Where in a declaration on a bill of exchange, an indorsement was alleged to “—— Laurie and —— Burns, trading under the name of Laurie & Burns,” who indorsed to the plaintiffs, and the defendant demurred specially because the christian names of Laurie and Burns were not set out—the demurrer was set aside as frivolous. *The Bank of Montreal v. Hopkirk*, i. U. C. R. 418.

[Also, see div. V. 34.]

Liability of indorsers, (defendants), plaintiffs having compromised with the maker as to a portion of the note.—4. A. made his note payable to B., who indorsed to the defendants, and the defendants to the plaintiff, who averred in his declaration a presentment of the note to B. instead of to A.—the note was made solely for the accommodation of the defendants, without any consideration to A. the maker,—the plaintiff compromised with A., taking from him a portion of the note, and then discharging him, striking his name out of the note.—The jury gave a verdict against the defendants for the balance of the note: *Held per Cur.*, verdict right. *Sifton v. Anderson et al.*, v. U. C. R. 305.

Note payable to bearer—Indorser thereon—How to be sued.—5. A party indorsing a note payable to A. or bearer, may be sued as indorser. He may also be sued jointly with the maker, under our statute 3 Vic. ch. 8. *Ramsdel v. Telfer et al.*, v. U. C. R. 508.

Note payable to maker's own order—Suit by indorsee claiming by indorsement from maker.—6. A. makes a promissory note, payable to his own

order—B. sues him as indorsee, claiming by indorsement of A. made subsequent to the note: *Held*, that the declaration in that form was bad on special demurrer. *Brown v. Shaver*, v. U. C. R. 621.

Transfer of notes by person not having right to do so—Cancellation of.—7. Where in a deed of separation the husband covenanted to pay his wife 150*l.*, and appointed trustees, who being indebted to the husband in that amount, gave him their separate notes for payment to his order, which he indorsed in blank and returned to them for the benefit of his wife, and one of the trustees then gave to the wife the notes signed by him, with an indorsement that they were not to be sold by her, and she assigned them to the plaintiff: *Held*, that he could not recover against the trustee on the notes, as they having been returned by the husband to the trustee, were cancelled; and that the wife had, at any rate, no power to transfer them. *Wilson v. McQueen*, Easter Term, 3 Vic.

[Indorsement by wife with sanction of husband.—See case 18, *infra*.]

Accommodation note—Alteration.—8. Where the payee of a note indorsed it for the accommodation of the maker, leaving the date and sum blank, which was afterwards filled up by the maker, and the note dated of a time later than the blank was indorsed, but prior to the time when the note was actually filled up: *Held*, that the note was good against the payee, notwithstanding the alteration. *Sandford et al. v. Ross*, Hil. Term, 4 Vic.

[See case 15, *infra*.]

Action by payee against maker and indorser subsequent to himself.—9. Where in an action by the payee against the maker and indorser of a promissory note it appeared that the indorser put his name on it as a surety for the maker: *Held*, that the plaintiff could not recover against him, as he was a party to the note subsequent to

the plaintiff himself. *Jones v. Ashcroft et al.*, Trin. Term, 4 & 5 Vic.

[See cases 14 and 24, *infra*.]

Note in custody of indorsee, but indorsement cancelled—Inference therefrom.—10. Where an indorsee suing upon a note, produces it at the trial from his own custody, with an indorsement thereon which has been cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given the jury for rejecting the inference that the note has been satisfied by the indorser, whose name is thus cancelled. *Peel v. Kingsmill*, vii. U. C. R. 364.

Indorsement of note by administrator.—11. It is no ground for impeaching the indorsement of an administrator, that the debtor at the time of the intestate's death resided out of the jurisdiction of the Surrogate Court by which the letters of administration had been granted. *Wright v. Merriam*, Mich. Term, 6 Vic.

Note not negotiable—Liability of parties indorsing.—12. A party indorsed his name on the back of a note not negotiable, or if negotiable, not indorsed by payee, cannot be sued as indorser by the payee. *West v. Brown*, (*Robert A.*), iii. U. C. R. 290.

Note payable to bearer and indorsed—Liability of indorser.—13. A. makes a note payable to B. or bearer, and delivers it to B., B. indorses to C., the holder sues B. on his indorsement: *Held*, that upon such indorsement, an action would lie against B. *Booth v. Barclay et al.*, vi. U. C. R. 215, and *Scott et al. v. Douglass*, Trin. Term, 6 & 7 Wm. IV.

Note payable to bearer—Indorser before delivery to bearer.—14. Where A. made a note payable to B. or bearer, and C. indorsed it as a surety to B. without B.'s indorsement: *Held*, that B. could not recover on the note against C. as a maker, or on any other ground. *Thew v. Adams*, Hil. Term, 3 Vic.

[See case 24, *infra*.]

Effect of maker's signature being made after indorsement to holder.—

15. It is no objection to the validity of a note, that at the time it was indorsed to the plaintiffs it had not in fact been signed by the maker; the subsequent filling up of the maker's name, or of the amount, or of a payee's name, will be treated as if made before the indorsement. *Rossin et al. v. McCarty et al.*, vii. U. C. R. 100.

What put in issue by the plea "did not indorse in manner, &c."—*An indorsement of note when over due, no excuse for non-presentment to maker.*—

16. A. the indorsee of a note sues B. the indorser, and alleges in his declaration, that after the note became due, to wit, &c., B. indorsed to A.—There was no averment of presentment to the maker, or of notice of non-payment.—B. alleges that he did not indorse the note in manner and form as the plaintiff alleged: *Held*, that under this plea, the fact of indorsement and not the time, was all that was put in issue. *Held* also, that the note being indorsed to the plaintiff when over-due, was no excuse for non-presentment to the maker, and that therefore the declaration was bad, in not shewing a sufficient cause of action. *Held* also, that although the declaration was substantially defective, yet as the plaintiff had been non-suited upon the insufficient ground of not proving the time as well as the fact of indorsement, the non-suit must be set aside; the court however, in such a case, may grant a new trial without costs, and then allow the plaintiff to amend. *Davis v. Dunn et al.*, vi. U. C. R. 327.

Averment of joint and several liability, under 3 Vic. ch. 8.—17. The defendants were sued as maker and indorser of a note, under the statute 3 Vic. ch. 8.—The declaration, after setting out the note and indorsement, stated the defendants' liability thus—"whereby the defendants became liable, &c.:" *Held*, on special demurrer

declaration bad, in not alleging, according to the form in the act, a joint and several liability. *Nordheimer et al. v. O'Reilly et al.*, vi. U. C. R. 413.

Indorsement by wife.—18. *Semble*: That a defendant's indorsement made by his wife, though in her own name, and proved, as in this case, to have been afterwards recognized by the defendant, would make him liable to an action on the bill. *Ross et al. v. Codd*, vii. U. C. R. 64.

The effect of a prior indorser of a note being made executor by the holder.—19. A. makes a note payable to B. or order, B. indorses to C. who indorses to D., D. the holder dies, leaving B. one of the executors—the executors of D. sue C.: *Held*, that D. having made B. his executor, B. was discharged from the debt, and that there was no remedy against the subsequent indorser. *Semble*: That though under the authority of *Bishop v. Hayward*, 4 T. R. 470, where a plaintiff suing in his own name is liable over to the defendant by reason of a prior indorsement, he cannot recover; yet, if he sue with others, not in his own name, but as an executor, he may. *Jenkins et al. v. McKenzie et al.*, vi. U. C. R. 544.

Liability of indorser after drawee has refused acceptance.—20. The indorser, like the drawer of a bill of exchange, is liable to the holder the moment the drawee has refused acceptance. *Ross et al. v. Dixie*, vii. U. C. R. 414.

Second indorser paying note and afterwards suing a prior indorser thereon.—21. A second accommodation indorser who has paid a promissory note discounted at a bank for the benefit of the maker, may maintain an action on the note against a prior accommodation indorser, and may indorse it over after it is due. *Breeze v. Baldwin*, Hil. Term, 7 Wm. IV.

Renewal note not used as such—Liability of indorser thereon.—22.

A promissory note which had been intended as the renewal of another note, but which had not been so used, but had been left in the maker's hands with an indorser's name upon it, and was received by the plaintiff from the maker for a valuable consideration before it became due—the indorser was held liable on such note. *Larkin v. Ward*, Trin. Term. 1 & 2 Vic.

Negotiability of foreign bills here.—23. A promissory note made and indorsed in a foreign country, is negotiable here within the statute of Anne. *Thompson v. Sloan*, Mich. Term, 2 Vic.

Note payable to a particular person—Indorser before delivery to that person—His liability to holder.—24. A. made his note payable to B. or bearer; before the note was delivered to B., D. indorsed it; B. sued both A. and D., averring that A. made the note &c., and that the note was then delivered &c., to D., who became the lawful bearer thereof, who then, as such lawful bearer thereof, indorsed and delivered the same to B.: *Held*, that under this form of note, and the averments as made, that D. the indorser was liable to B. as the holder of the note. *Vanleuven v. Vandusen et al.*, vii. U. C. R. 176.

V. ACTION, PLEADINGS, AND EVIDENCE.

See ALTERATION.—BILLS OF EXCHANGE ETC., II. 10; III. 4, 25.—COMPOSITION.—CONTRACT, 4.—CORPORATION, 3.—DE INJURIA, 1, 5, 6.—EXECUTORS ETC., II. 8.—JOINT STOCK COMPANY, 3.—KINGSTON MARINE RAILWAY COMPANY, 2.—NEW TRIAL, I. 8.—ONUS PROBANDI, 7.—PLEADING, I. 2, 3, 5, 6, 9, 15; II. 8, 9, 13, 18, 21, 22, 23, 30, 35; III. 6, 12; VI. 2 et seq.—SET-OFF, 14.—VARIANCE, 16.—WITNESS, 5, 13, 14, 16, 17.

Action—Parties—Evidence—Agency.—1. No action lies upon a bill

except against those who are in some shape parties to the bill itself. Where therefore, A. drew a bill of exchange upon B. in Montreal in his own favor, and indorsed it to C., who in her own name indorsed it to the plaintiffs; and it appeared upon the evidence, that C. was a lady residing in Toronto, who had a brother D. residing in Buffalo, for whom, though not a partner, or in any way transacting business in his name, she had negotiated bills at banks and with merchants: it was held, that in an action on the bill brought by the plaintiffs, the indorsers, against D., upon an averment "that A. indorsed the said bill to one C., the agent of *this defendant*, or her order, and delivered it so indorsed to her as *such agent*, and that the said C. then being the agent of the defendant in that behalf, authorized for, and on behalf of the defendant, then indorsed and delivered the same to the plaintiffs," that the action could not be sustained, the name of the principal D. not appearing upon the bill in any shape. *Ross et al. v. Codd*, vii. U. C. R. 64.

Attachment issuing against the payee of a note, an absconding debtor—Its effect on his right to sue maker on his return.—2. The payee of two promissory notes for 25*l.* each, having absconded, is not thereby disabled from suing the maker upon them on his return to the province, because in his absence an attachment had been taken out against him for 2*l.* by A. a creditor. *Slattery v. Turney et al.*, vii. U. C. R. 578.

Averments of liability and promise.—3. It is not necessary in a declaration upon a bill or note, after stating the defendant's promise, to aver his legal liability to pay the bill or note to the plaintiff. *Acheson v. McKenzie*, iv. U. C. R. 230.

[See cases 12, 13, and 14, *infra*.]

Averment of presentment.—4. In an action on a promissory note, the

declaration must aver presentment for payment at the place where the note is made payable. *Ferrie v. Rykman*, Dra. Rep. 64.

Against acceptor of a bill—Variance between pleadings and evidence.]

—5. In an action against the acceptor of a bill of exchange, on an averment that it was directed to and accepted by him, it was held no variance that the bill was directed to and accepted by a firm in which the defendant was a partner, as the averment was according to the legal effect, and was not matter of description. *Starkweather et al. v. Andruss*, Easter Term, 4 Vic.

Declaration on lost bill.—6. Where the plaintiffs' declared against the drawer of a lost bill of exchange on a promise to pay it, but did not state any new consideration for the promise, nor allege that the bill, which was drawn payable to the plaintiffs' order, was unindorsed at the time of the loss—the declaration was held bad on special demurrer. *Russell et al. v. McDonell*, (*executors of*), i. U. C. R. 296.

[See evidence of lost bill.—EVIDENCE, II. 13.]

Averment of names of firm—Indorsement by firm.—7. In declaring upon a note made payable to and indorsed by a firm, it is necessary to aver that the maker of the note promised to pay "to certain persons, using the name and style of &c.," and then to aver that the said persons so using the name and style of &c., did by such name and style &c., indorse the said note. *Moffatt v. Vance*, vii. U. C. R. 142.

Declaration on note payable to bearer.—8. In a declaration by the holder of a promissory note payable to bearer, it is not necessary to aver that the note was "assigned over" and delivered to the plaintiff. *Duggan v. Borland*, Hil. Term, 6 Wm. IV.

Declaration on bill against acceptor

and indorser—Alteration—Evidence.]

—9. A. the holder of a bill sues B. the acceptor and C. the indorser, as upon a bill dated “1st of June 1847, payable three months after date,” which when produced at the trial, appears to have been in fact dated “November 1841, and payable four months after date,” and to have been altered by erasure and made to read as declared upon: *Held*, that the alteration made in the bill was material to the contract, and therefore fatal to the holder’s recovery, though an indorsee for value, and not shewn to have been in any way privy to the alteration: *Held also*, that the alteration in the body of the bill as to the time of payment was properly given in evidence under the pleas of “did not accept,” and “did not indorse.”

Quære: Could the alteration in the date be given in evidence under these pleas? (Draper, J. dubitante on this point.) *Meredith v. Culver et al.*, v. U. C. R. 218.

Joint acceptors—Averment of joint and several liability.]—10. The plaintiffs declare against the drawer and acceptors of a bill of exchange under 100*l.* in one action—the acceptors sign as parties *jointly* liable: *Held*, that an averment that the parties became jointly and *severally* liable, is bad on demurrer. *The Bank of Upper Canada v. Gwynne et al.*, iv. U. C. R. 145.

3 Vic. ch. 8.]—11. The form given in the statute 3 Vic. ch. 8, must be adopted with reference to the mode in which the several parties to a bill or note make themselves liable. *Ib.*

Payee against maker—Averment of promise to pay, and liability.]—12. It is not necessary for a payee or indorsee in declaring upon a promissory note against the maker, to aver any express promise in addition to that which is set forth as contained in the note itself, neither is it necessary to

aver any liability to pay the note. *Whitney v. Woods*, v. U. C. R. 572.

Indorsee v. Indorser—Averment of promise to pay after that of liability.]

—13. In an action of assumpsit brought by the indorsees against the indorsers of a note, the declaration, after averring the indorsers’ liability to pay, need not aver that they *promised* to pay. *The Bank of British North America v. Jones et al.*, vii. U. C. R. 166.

Necessity of averment of promise when indorser sued as executor.]—14.

If however the party sued be the executor of the indorser and not the indorser himself, and the note has become due after the death of his testator, a promise to pay by the executor must be stated in the declaration. *Ib.*

Action by accommodation payee against maker on lifting the note.]—

15. The payee of a promissory note given in payment of goods sold by D. to the maker, and indorsed by the payee and C. for the maker’s accommodation, and discounted by D. at a bank, may maintain an action against the maker on his non-payment of the note, although he has himself paid it only by giving new notes (to which the maker is not a party) in satisfaction, which are unpaid, and no consideration ever passed between the maker and him. *Latham v. Norton*, Easter Term, 3 Vic.

Action against maker and indorser—Averment of presentment to maker and notice to indorser omitted.]—16.

Where in an action against the maker and indorser of a promissory note under 5 Wm. IV. ch. 1, and 3 Vic. ch. 8, the plaintiff declared in the form given by the later statute, but did not aver presentment to the maker and notice to the indorser: *Held*, on demurrer by both defendants on that ground, that the plaintiff was entitled to judgment against the maker, and that the indorser was entitled to judg-

ment against him. *Small v. Rogers et al.*, Mich. Term, 6 Vic.

Narrow and insufficient traverse.] 17. In assumpsit by the payee against the maker of a promissory note, the defendant pleaded that the note was made for the accommodation of the plaintiff, and without consideration, the plaintiff replied that there was a good consideration—to wit, the amount of the note, without traversing that it was made for the plaintiff's accommodation—the replication was held bad on special demurrer. *Gilmore v. Edwards*, ii. U. C. R. 419.

Holder v. Drawer of a bill—Several intermediate indorsers—Averment of notice.]—18. Where the holder is suing the drawer of a bill, upon which there have been several intermediate indorsers, it is not necessary for the holder to shew notice given to each indorser within the regular period; all that the holder is required to do in the first instance, is to shew due notice to the party against whom he is proceeding. *Boyes v. Joseph*, vii. U. C. R. 505.

Evidence to support plea of fraud—Appeal from District Court.]—19. Declaration by the holder of a note payable to A. B. or bearer, against the maker.—Plea, that A. B. and others in collusion with him, obtained the note declared upon by fraud &c. Upon this pleading, the judge of a district court refused to allow the defendant to prove that the original note for which the note sued upon had been substituted had been fraudulently obtained from the testator, (the executor having given the note sued upon,) by a party who had no connection with the note in suit; and *Held per Cur.*, dismissing the appeal from the court below, that the evidence had been properly rejected. *Dougal v. Post*, v. U. C. R. 554.

Admissions in evidence.]—20. The admissions of the holder of an overdue note, are admissible in evidence,

without calling him against a person to whom he has subsequently transferred the note, in an action brought upon the note by such subsequent assignee. *Myers v. Cornell*, ii. U. C. R. 279.

Pleading—Allegation of time under 3 Vic. ch. 8.]—21. Where in assumpsit against the makers and indorsers of a promissory note under the provincial statute 3 Vic. ch. 8, the plaintiff averred that the payee duly indorsed the note to the plaintiff, but there was no allegation of time to the indorsement, nor was the word “afterwards” used as given in the form in the statute—the declaration was held insufficient. *Grant v. Eyre et al.*, ii. U. C. R. 426.

[See case 24, *infra*.]

Declaration on note in foreign language.]—22. In declaring on a note drawn in a foreign language, and where a foreign word is used, its meaning in English may be averred without any introductory statement that such a word is of such a language and of such a signification in English. *Gibb v. Morissette*, iv. U. C. R. 205.

23. The plaintiff, indorsee of a note, declares against the maker, “for that the defendant made his promissory note and thereby promised to pay B. or order *the sum of two hundred louis current money, meaning thereby the sum of two hundred pounds of lawful money of Canada*: *Held*, on demurrer to the declaration for unwarrantably extending the meaning of the word “louis,” that the declaration was good. *Ib.*

Averment as to time of indorsement.]—24. It is bad on special demurrer to aver that he (the maker) then—to wit, *at the time of making* this instrument—indorsed, delivered and assigned the same to A., who assigned it to the plaintiff. *Wallace v. Henderson*, vii. U. C. R. 88.

Action against indorser—Plea of time to maker.]—25. A plea of time

given to the maker of a note in an action against the indorser, is bad, unless it expressly shew that when the time was given the plaintiff was the holder of the note. *Commercial Bank v. Johnston*, ii. U. C. R. 126.

Note payable to maker's own order. How to be declared on.]—26. A note payable to the maker's own order may be declared on as a note payable to the bearer; but to declare upon such a note that he (the maker) made an instrument in writing promising to pay to his own order, would be bad. *Wallace v. Henderson*, vii. U.C.R. 88.

Indorsee against maker—Plea of satisfaction by maker to payee—De injuria.]—27. In an action by an indorsee against the maker of a note, a plea of satisfaction by the maker to the payee after the note became due is well traversed by the replication of de injuria (Robinson, C. J., dissentiente). *Muttlebury et al. v. Hornby et al.* vi. U. C. R. 61.

[Upheld in *Brooke v. McCausland*, vi. U. C. R. 104, in which payment was pleaded before the note became due.—Robinson, C. J., dissentiente in that case also.]

Special traverse of plaintiff not being the owner—Replication—Demurrer.] 28. To an action on a note by the payee against the maker, the defendant pleaded that before the commencement of the suit, &c., the plaintiff indorsed to A., who then became the holder of the note, and to whom therefore the plaintiff was liable—the plaintiff replied by re-affirming that he was the holder of the note, and specially traversing that A. was the holder, as the plea asserted—the defendant demurred: *Held*, replication good. *Dickenson v. Clemow et al.* vii. U. C. R. 421.

Holder v. Maker—Plea of special agreement when note made.]—29. Where, in assumpsit by the holder of a promissory note payable to A. or bearer on demand, the defendant pleaded an agreement between A.

and himself, at the time the note was made, that it should be held by A. as a security for the settlement of their future accounts, and that it was retained by A. after it was due, and that he then transferred it to the plaintiff, and that on settlement A. was largely indebted to the defendant,—the plea was held bad on general demurrer. *Harvey v. Geary*, i. U. C. R. 483.

Declaration—Initials.]—30. In declaring upon a promissory note the name of the payee was set forth as John S. Shaver: *Held*, upon demurrer for not setting forth the second christian name at full length, declaration good. *Dougall v. Reafisch*, vi. U. C. R. 391.

[The court, in Michaelmas Term 1849, in two cases, adhered to the decision they came to in this case.]

31. Where a payee was described, in declaring upon a note, by the capital letter of his second christian name, James A. Walker, as he described himself in the note, instead of giving his second name in full, the court held the declaration good—adhering to the decision of this court in *Dougall v. Reafisch*, 6 U. C. R. 391 supra. *Muir v. Jones*, vii. U. C. R. 139.

32. Wherever, in pleading, one christian name shall be given to a party in full, with a capital letter before or after it, besides the surname, the court will not assume that the party so described has anything more of a name than is given to him, and that without distinction between vowels and consonants. *The Bank of Upper Canada v. Gwynne*, vii. U. C. R. 140.

[It is informal to describe any one of the parties by initials only of his christian names without shewing him to be so described in the bill. *Esdaile v. McLean*, xv. M. & W. 277.]

Pleadings—Departure.—33. A replication to a plea stating that a bill of exchange had been taken “in full satisfaction and at all hazards” by the

plaintiff; that the bill was dishonored when due, is bad on general demurrer, as the plea is in answer to the action. *Goldie v. Maxwell*, Hil. Term, 4 Vic.

Description of parties without stating christian names or affirming excuse therefor.]—34. Indorsees against the acceptor of a bill of exchange, "For that whereas certain persons, trading under the name, style and firm of Desbarats & Derbyshire, on &c., made their bill in writing, and thereby required the defendant to pay the said Desbarats & Derbyshire or order, &c., and the said Desbarats & Derbyshire, then indorsed the same to the plaintiff," &c.—Demurrer, because the said supposed drawers of the said bill were not properly described and designated by their christian names, neither was any excuse offered therefor, nor was it alleged that the said supposed drawers drew the said bill by the name style or firm in the said declaration mentioned: *Held*, declaration bad. *City Bank of Montreal v. Eccles*, v. U. C. R. 508.

Initial letters of second name.]—35. Indorsees against the maker and indorsers of a promissory note, under our statute 3 Vic. ch. 8; "For that whereas the said George C. Roblin, on, &c., made, &c., and the said Philip J. Roblin indorsed, &c."—Demurrer, because George C. Roblin and Philip J. Roblin were not declared against by their proper names as given them in their baptism, but merely by the initial letters of one of their first names: *Held*, declaration good. *Commercial Bank v. Roblin, et al.*, v. U. C. R. 498.

5 Wm. IV. ch. 1—*Annexing copies of note to declaration—Proof of.*]—36. Where the holder of a promissory note proceeds under 5 Wm. IV. ch. 1, he must prove at the trial that copies of the note were annexed to the declarations filed and served. *Malloch v. Norton*, Mich. Term, 2 Vic.

VI. CONSIDERATION, AS A GROUND OF DEFENCE.

See DE INJURIA, 5, 6.—ILLEGALITY, 2.—MAINTENANCE (STATUTE OF), 19.—MIDLAND DISTRICT TURNPIKE TRUST, 2.—NEW TRIAL, I. 13.—PLEADING, II. 17; III. 7.

Defence of note being given in payment of a gambling debt, or through fraud.]—1. In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for a valuable consideration, also, after it was due, it is no defence that the note was assigned to the person who transferred it to the plaintiff in payment of a gambling debt and through fraud. *Burr v. Marsh*, Mich. Term, 4 Vic.

Joint lease by two persons—Action by executors of one of the parties on notes given for the rent.]—2. A. being seized in fee of lands, made jointly with B. a lease of those lands to C., taking promissory notes from C. for the rent, payable as it would become due, the day after the execution of the lease, A. died intestate, and then B. died, and B.'s executors sued C. on the notes: *Held*, that they could not recover the consideration for which the notes were given, having failed. *Merwin et al. v. Gates (executors of)*, Easter Term, 7 Wm. IV.

Partial failure of consideration for note.]—3. Where in an action on a promissory note the defendant proved that the note had been given by him to the plaintiff on a sale of some hams warranted good by the plaintiff, that a large sum of money was paid at the time, and the note given for the balance, that the hams were many of them worm-eaten and utterly useless, and that the money paid was equal to the value of all the hams—and the jury found a verdict for the defendant on the ground that the hams were not worth more than the money paid, on a direction by the presiding judge, that

such finding would be a defence—the court held, that the partial failure was no defence to the action on the note, without evidence of fraud, and a new trial was granted, costs to abide the event. *Kellogg et al. v. Hyatt*, i. U. C. R. 445.

[Agreeing with *Trickey v. Larne*, vi. M. & W. 278. Also see 13 & 14, *infra*.]

Accommodation indorsement—Proof of want of consideration.—4. Where in an action on a promissory note payable to A., it was proved that B. indorsed it, and then brought it to A. who indorsed it merely for accommodation, never having received any value for it—the court held, that want of consideration could not, on these facts, be inferred, as between the maker and B., and that the plaintiff was not obliged to prove the consideration. *Mair v. McLain*, i. U. C. R. 445.

Usury—Indorsee against accommodation maker—Sum recoverable.—5. In an action by the indorsee of a promissory note against the maker, de injuria is a good replication to a plea of usury between the indorser and the indorsee; but where the defendant pleaded as to part of the sum secured by the promissory note that the maker made the note only for the accommodation of the payee, and that the indorsee gave only a certain sum for it, and that it was transferred to him to secure that sum, and the plaintiff replied that the note was given to him to secure that sum, to be paid at a particular time, but that if it were not paid at that time, the plaintiff was to hold the whole sum secured by the note: It was held, that the replication was bad in substance, as the defendant being only an accommodation maker, could not be charged with more than the plaintiff gave for the note. *Strathy v. Nicholls*, i. U. C. R. 32.

Proof of want of consideration.—6. To an action on a promissory note, the defendant pleads the non-performance by the plaintiff of an alleged con-

tract, to shew failure of consideration: *Held*, that such contract is not divisible, but must be substantially proved as laid. *Mathewson v. Carman (Daniel)*, i. U. C. R. 266.

7. A debt due to a bankrupt estate is a good consideration for notes for that debt given to the trustees and assignees of the estate. *Gates et al. v. Crooks*, Dra. Rep. 459.

Debt of third party.—8. *Semble*: That a debt due by a third party, but not yet payable, may form a valid consideration for a promissory note. *Dickenson v. Clemow et al.*, vii. U. C. R. 421.

Plea of accommodation and no consideration—Replication traversing consideration and not accommodation.—9. In assumpsit by the payee against the maker of a promissory note the defendant pleaded that the note was made for the accommodation of the plaintiff and without consideration; the plaintiff replied that there was a good consideration, to wit, the amount of the note, without traversing that it was made for the plaintiff's accommodation—the replication was held bad on special demurrer. *Gilmore v. Edmunds*, ii. U. C. R. 419.

Want of consideration, as between indorsee and indorser, pleaded by maker.—10. It is no defence to an action on a note by the indorsee (a holder) against the maker, that the plaintiff gave no value to the indorser for his indorsement, or that he took the note knowing at the time he took it that it was indorsed for the accommodation of the maker. *Miller v. Ferrier*, vii. U. C. R. 540.

Plea of no consideration.—11. A plea, that the defendant indorsed the note without consideration from the maker, or the plaintiffs, is bad. *Bank of British North America v. Sherwood*, vi. U. C. R. 213.

12. A plea, that the promissory note was made by the defendant to

the plaintiff as a gratuity, and that the defendant never had or received any consideration therefor, is good. *Poulton v. Dolmage*, vi. U. C. R. 277.

Partial failure of consideration.]
—13. It is no defence to an action on a promissory note, that it was given on a consideration that did not prove so beneficial as it was represented. *Dalton v. Lake*, Mich. Term, 5 Wm. IV.

14. Partial failure of consideration is no defence to an action on a promissory note. *Dixon v. Paul et al.*, Mich. Term, 6 Wm. IV.

VII. OTHER GROUNDS OF DEFENCE.

See ATTORNEY, IV. 7. — BILLS OF EXCHANGE ETC., I. 3, 4, 5, 6, 9.

Pleadings—Admission as to part, and no consideration as to residue.]
1. The plaintiff sued upon a bill of exchange, drawn by A. upon B., 1st April, 1847, for 30*l.* payable to his own order in ninety days, and accepted by B., and payable at the Bank of Montreal.—He averred that A. indorsed the bill to C. and C. to him the plaintiff.—The defendant A. pleaded as to 15*l.*, part of the sum claimed, that he made and delivered the bill to the plaintiff, who accepted the same from him on an undertaking that he was to collect it and apply 15*l.* out of the proceeds to pay that amount due to the plaintiff, wherefore, except as to 15*l.*, there was no consideration for making the bill of exchange. Demurrer to plea: *Held*, plea bad. *Brown v. Garrett et al.*, v. U. C. R. 243.

Contemporaneous oral agreement.]
—2. The defendant pleaded, that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, which had a certain time to run, the plaintiff agreed not to sue upon the note made by the defendant until the other notes should become due: *Held*, upon general de-

murrer, plea bad. *Durand v. Stevenson*, v. U. C. R. 336.

Indorsee against maker—Agreement between indorser and maker, known by indorsee.]
—3. Where the plaintiff, indorsee of a promissory note payable on demand, had taken it two years after its date, and was cognizant of an agreement between the holder, from whom he took it, and the defendant, (the maker), that the same should be set off against a bond, of which the defendant was obligee, and the holder the obligor—the court held, that a plea stating these facts was good upon general demurrer. *Brooke v. Arnold*, Tay. U. C. R. 25.

Pleadings—Special plea—Replication de injuria.]
—4. Declaration on a note, payee against maker—plea, (in effect), that the plaintiff took the note on the understanding that he was not to enforce it until a certain event should occur, that the event which would have entitled him to enforce it never did occur, but on the contrary that happened which by the agreement was to disable the plaintiff from ever making use of the note, and that therefore the defendant was excused from paying it—replication, de injuria: *Held*, on demurrer to replication, replication good. *Quære*: Is the plea as stated in the report good in form? *Brown v. Hawke*, v. U. C. R. 568.

Payee against maker, a member of a joint stock company—Forfeiture as a defence.]
—5. Where a stockholder in a joint stock company had given notes for the amount of his stock, which he afterwards forfeited by not complying with the conditions of the association: *Held*, that he could not set up such forfeiture as a defence to an action on the notes for the benefit of the company. *Glassford et al. v. McFaul*, Trin. Term, 3 & 4 Vic.

Plea by one of two joint makers, that note was made by him as surety for the other, &c.]
—6. One of the joint makers of a promissory note cannot

plead that he made the note with the plaintiff's knowledge only as a surety for the other maker, and that the plaintiff gave time to the other maker without his knowledge or consent, and that he was thereby discharged; and if such a plea were tenable, *de injuria* would be a good replication to it. *Davidson v. Bartlett et al.*, i. U. C. R. 50.

Defence inconsistent with note.]—7. A plea to a declaration on a promissory note, setting up a parol agreement inconsistent with what the indorsement on the note imports, is bad. *Hart et al. v. Davy*, i. U. C. R. 218.

Merger—Defence of higher security.]—8. Where a person having taken from his debtor a note of a third party indorsed by the debtor, as security for a portion of his debt, takes, afterwards, a mortgage from his debtor for the whole sum due him, appointing a day for payment more distant than that on which the note is to fall due, and with the usual covenant in the mortgage to pay the money: *Held*, that the remedy against the debtor as indorser of the note, is extinguished by taking the mortgage for the same debt, there being no reference made in the mortgage to the note, as being an outstanding security for the same debt. *Mathewson v. Brouse*, i. U. C. R. 272.

Merger—Higher security.]—9. Where in an action by the indorsee against the maker of a promissory note, the defendant pleaded that at the time the note was given a mortgage was taken by the payee of the note, with a proviso for its payment, according to the tenor of certain promissory notes bearing even date therewith, payable to the payee, and that the note declared on was one of those promissory notes, and was indorsed to the plaintiff after it was due—the plea was held bad, as by the very terms of the mortgage it was evidently taken as collateral security, and not in satisfaction, or as a merger of the promissory notes. *Murray v. Miller*, i. U. C. R. 353.

Pleadings—Evidence.]—10. In assumpsit for goods sold and delivered the defendant pleaded that he made his note to the plaintiffs for part, and paid the note when due; and the plaintiffs replied, that when the note became due the defendant only paid part, to wit, 93*l.* in money, and gave an acceptance on A. for the residue, 50*l.*, which was dishonored when due, of which due notice was given, concluding with a special traverse; and the defendant reiterated the defence in the plea: *Held*, that he could not on the trial shew that the plaintiffs had made the 50*l.* acceptance their own through laches, but under the pleadings was bound to shew *actual payment*. *Ross et al. v. McKindsay*, i. U. C. R. 507.

Statement of special circumstances, and resting defence thereupon.]—11. Indorsee against maker upon an overdue note—plea, setting out the special circumstances under which the note was originally given, and denying thereupon the right of the payees to negative the note: *Held*, plea no defence as to a certain portion of the note, but a good defence as to the balance. *Rennie v. Jarvis*, vi. U. C. R. 329.

Evidence under plea of non-assumpsit.]—12. In assumpsit upon a promissory note, transferred by the payee to the plaintiff after it became due, on non-assumpsit the defence set up was that the defendant and the payee had a settlement, when the defendant agreed to convey a lot of land within six months, to give over certain stock, and to give the note now sued upon, the payee agreeing to deliver up to the plaintiff certain promissory notes, according to a schedule—that the defendant delivered the stock, gave his note, and mutual receipts were exchanged—that the defendant then accompanied the payee to his house in order to get the promissory notes in the schedule, but the payee had only a part, which the

defendant refused to accept, unless the whole were delivered up to him. It did not appear that the land had since been conveyed, nor what amount of the promissory notes was deficient; but at the trial, the jury found that the payee at the time of the settlement concealed from the defendant that he had not all the promissory notes in the schedule in his possession: *Held*, that the defendant could urge these facts as a defence to the action on his note. *McCollum v. Church*, iii. O. S. 356.

Note arising out of a contract which partially failed.—13. A. and B. exchanged horses, each taking that of the other, and B. gave A. a promissory note for a difference of value in the exchange, A. sold the horse he got from B. almost immediately; and after a lapse of two years, during which nothing appears to have been done by either party, B. is sued upon this note by A.: *Held*, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall v. Coleman*, iii. O. S. 39.

Evidence.—14. *Semble*: That under the pleas given in the report of this case the cancellation of the first note, by the substitution of the second, could not be given in evidence. *Cuvillier et al. v. Fraser*, v. U. C. R. 152.

Notes given subject to the performance of a condition—Performance of that condition satisfies the notes.—15. Where the defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed, if default were made in the payment, that he would give up the property, and the plaintiff should sell it to pay himself, and give the overplus, if any, to the defendant, and at the same time the defendant gave the plaintiff his promissory notes for the purchase money, which were not to be acted upon if the property were given up;

on default having been made the property was given up to, and sold by the plaintiff for less than the mortgage money, and an action was brought on one of the promissory notes to recover the difference: *Held*, that it would not lie, the notes having been satisfied by the surrender of the property according to the agreement. *Smith v. Judson*, Hil. Term, 5 Wm. IV.

Indorsee v. Indorser—Defence, that maker's name forged.—16. In an action by the last indorsee against the last indorser of a promissory note, it is no defence that the names of the maker and of the prior indorsers are forged. *Eastwood et al. v. Wesley*, Mich. Term, 2 Vic.

VIII. MISCELLANEOUS MATTERS.

See ACCORD AND SATISFACTION, 3.—

ACCOUNT STATED, 2, 3, 8.—ARBI-

TRATION AND AWARD, III(1), 4.—

ARREST, I. 6, 8, 22, 33, 34; III.

3.—COMMON COUNTS, 3.—COSTS,

I(1), 2, 12, 16, 21; I(2), 4, 6, 9.—

EVIDENCE, V. 5.—JOINT STOCK

COMPANY, 1, 2, 3.—KINGSTON MA-

RINE RAILWAY COMPANY, 1.—LIM-

ITATIONS (STATUTE OF), III. 1, 12.

MONEY HAD AND RECEIVED, 8.—

PARTICULARS OF DEMAND, 5, 6.—

PAYMENT, 8.

Commission—Usury.—1. A commission of $2\frac{1}{2}$ per cent. on drawing and accepting bills of exchange is usurious, and will not be allowed. *Bradbury v. Holton*, Easter Term, 2 Vic.

Ten per cent. damages on protested foreign bills—Postage—How recoverable.—2. Ten per cent damages under 51 Geo. III. ch. 9, sec. 2, cannot be recovered on a foreign bill returned for non-acceptance, nor can re-exchange, unless declared for specially; although postage may, under a count for money paid. *O'Neill v. Perrin*, Mich. Term, 3 Vic.

Ten per cent. damages on bills—How considered.—3. *Held*, that under the

statute 51 Geo. III. ch. 9, sec. 2, the ten per cent. damages allowed on protested bills of exchange is not to be considered as a substitute for the difference of exchange, but is to be paid in addition to the sum paid for the bill, which would always include exchange. (Sullivan, J. dissentiente.) *Nichols v. Raynes*, vi. U. C. R. 273.

[Since this decision, the statute 12 Vic. ch. 26, has been passed by our Legislature, removing all doubts upon the question, and leaving the law as in the opinion of the majority of the court it had existed under the old act.]

Commencement of action.—4. Where an action was brought upon several promissory notes, one of which was not due until near the end of the term in which process had been issued and returnable, but was due before the filing of the declaration, which was intitled generally of the term: *Held*, that the amount of that note could not be recovered in the action. *Kerr v. Jennings*, Mich. Term, 4 Vic.

Recovery of note on common count for money paid.—5. Where a plaintiff takes up a note which the defendant had given him, and which he was bound to pay at maturity, the plaintiff may recover against the defendant on the common count, as for money paid to his use. *McNab v. Wagstaff*, v. U. C. R. 588.

Computation on foreign bills.—6. A foreign bill may be referred to the master for the computation of the principal and interest, and ten per cent. damages under the provincial statute. *Commercial Bank v. Allen et al.* Trin Term, 1 & 2 Vic.

5 Wm. IV. ch. 1—*Construction of.*—7. The statute 5 Wm. IV. ch. 1 does not apply to parties signing notes as joint makers. *Sifton v. McCabe et al.*, vi. U. C. R. 394.

Joint debtors—Note of one no satisfaction of debt.—8. The note of one of two joint debtors is no satisfaction of the debt; where therefore, A. and B. being sued in assumpsit as

jointly liable on the common counts, A. pleaded as to 20*l.* of the demand, that B. before action brought, for himself and A. made his note to the plaintiff for 20*l.*, which the plaintiff then received and accepted for the 20*l.* and in payment thereof, and added that the plaintiff afterwards indorsed this note given to him by B. to persons unknown, who are still the holders thereof and entitled to sue B. thereon: *Held*, plea bad. *Leonard v. Acheson et al.*, vii. U. C. R. 32.

Duplicity, &c.—9. The plea was also held bad as being double, and as attempting to show B. liable to a third party, an indorsee, when the note, as set out in the plea, was evidently *not negotiable*. *Ib.*



BILLS OF LADING.

See CARRIER, 4, 6.

BILLS OF PARTICULARS.

See PARTICULARS OF DEMAND.

BILLS OF SALE.

See FRAUDULENT DEED ETC., *passim*.

BINBROOK (TOWNSHIP OF).

1 Wm. IV. ch. 8, 7 Wm. IV. ch. 59, *remedying erroneous surveys—Acts not applicable to married women.*—Under the statutes 1 Wm. IV. ch. 8, and 7 Wm. IV. ch. 59, passed for the purpose of remedying an erroneous public survey, an inhabitant living in the front concession of the township of Binbrook cannot be dispossessed by an ejectment brought after a prior submission to arbitration by the husband of a married woman owning land in the adjacent township of Saltfleet—the husband not being the owner of

the land, to whom alone these acts apply. *Doe dem. Crooks v. Ten Eyck*, and *Doe dem. Crooks v. Calder*, vii. U. C. R. 581.

BOARD AND LODGING.

See ARREST OF JUDGMENT, 10.—COMMON SCHOOLS, 8.

BOARD OF ORDNANCE.

See ORDNANCE DEPARTMENT.

BOARD OF POLICE OF LONDON.

See LONDON (TOWN OF).

BOARD OF WORKS.

See ARBITRATION AND AWARD, I. 10.

Service of process.—The Court, although an affidavit was produced that there was no member of the board of works residing in Upper Canada on whom a copy of process could be served, refused to allow service to be made on an engineer employed by the board in Upper Canada, or by affixing a copy of the process in the Crown office. *Sherwood et al. v. The Board of Works*, i. U. C. R. 517.

BODIES CORPORATE.

See CORPORATION.

BOND.

See ABSCONDING DEBTOR, 12.—ADMINISTRATION BOND.—ARBITRATION AND AWARD, *passim*.—ARREST, I. 1, 28.—BAIL, II. *passim*.—EJECTMENT, VIII. 6.—EVIDENCE, II. 1; V. 2.—FRAUDS (STATUTE OF), I. 3.—INDEMNITY BOND.—LIBEL AND SLANDER, III(1), 6.—LIMITS, II.—REPLEVIN ETC., 14, 15.

I. CONSTRUCTION AND OPERATION. II. PROCEEDINGS.

I. CONSTRUCTION AND OPERATION.

See DIVISION COURT, 5, 6.—ESTOPPEL, 1.—INDEMNITY BOND, 1, 2, 3, 4.—MORTGAGE, 2, 6.

Construction of conditions generally.—1. The condition of a bond must be construed as a whole, and any apparent repugnance may be reconciled by giving the condition effect, according to the intent appearing on the face of the whole instrument. *Nicolls v. Madill*, vi. U. C. R. 415.

Construction by intendment.—2. Where bonds or other instruments have omitted to say expressly to whom the money payable under them is to be paid, the Court, if this be plain from the context, will, by intendment, supply the words in the particular place they ought to have been. *Allen v. Coy*, vii. U. C. R. 419.

For conveyance of land—Condition precedent.—3. Where in a bond with a condition to convey land, no time is fixed for such conveyance, but the times for the payment of the purchase money are stated, the payment of the money is not a condition precedent to the execution of the deed. *Wilson v. Dickie*, Easter Term, 7 Wm. IV.

Which party bound to prepare deed.—4. The obligor of a bond with a condition for the conveyance of land, must prepare and tender the conveyance, unless the condition be to convey by such deed as the obligee shall require. *Harrison v. Livingstone*, Trin. Term, 1 & 2 Vic., *Mouck v. Stuart*, iv. U. C. R. 203, and *Prindle v. McCann et al.*, iv. U. C. R. 228.

[Also see case 10, *infra*.]

When bond considered a continuing security.—5. Where the defendant agreed to lend the plaintiff 2000*l.*, to be advanced as it might be required, and received from the plaintiff a con-

veyance of lands to secure the advances, and gave back a bond reciting the agreement, and binding himself to re-convey the lands on the repayment of the sums advanced, on a certain day; and the defendant, before that day, made further advances to 10,000*l.*, and received timber &c., on account to 7000*l.*: *Held*, that the bond was a continuing security, and that the defendant was not obliged to re-convey, on the payment of the 2000*l.* first advanced. *Wells v. Richie*, Easter Term, 2 Vic.

Bond for conveyance of land—Conditions precedent—Action on bond by executors of obligee.—6. Where in debt by executors on a bond to their testator, his heirs and assigns, the condition of the bond was, that if when the parties concerned relative to the bond should see cause to survey and divide lot A., then that the defendant should execute a deed of the north-east half of the lot to the testator, that the bond should be void; and the defendant pleaded—First, that the testator did not see cause to convey in his life-time; secondly, that before the defendant or testator saw cause to survey, the testator died; thirdly, that one of the plaintiffs was heir-at-law of the testator, and that he did not see cause to survey; fourthly, that neither the defendant nor the testator in his life-time, nor the defendant nor the plaintiffs, as executors, since the testator's death, saw cause to survey, &c.; and the plaintiffs in their several replications in answer, alleged that the testator in his life-time, &c., was ready and willing to survey the lot, and requested the defendant to survey and execute a deed according to the bond, but that the defendant refused: *Held*, that the pleas were bad, and that the survey and division were not conditions precedent to the execution of the deed; that the executors could well maintain the action, though not named in the bond; and that the testator, under the bond, was entitled to a con-

veyance in fee, and not merely for life. *Ruttan et al. v. Ruttan*, Trin. Term, 3 & 4 Vic.

[See div. II. 8, *infra*.]

Bond by collector of township rates—What arrears of taxes recoverable in an action on.—7. A bond given to the treasurer of a district, by the collector of the township rates, after the passing of the statute 6 Wm. IV. ch. 2, and before the repeal of the statute 5 Wm. IV. ch. 8, may be sued upon and a good breach assigned, in not paying over monies collected for arrears of rates due five years preceding that for which such collector was chosen to act, though the condition that he would collect such rates would not be binding after it had been made his duty by law to collect only those of the current year. *McLean v. Shaver et al.*, i. U. C. R. 189.

Bond to sheriff by a party whose goods are seized, to deliver them on request—Duty of party under such bond.—8. Where a party whose goods are seized under a *fi. fa.*, gives a bond to deliver them to the sheriff on request: *Held*, that the effect of that condition is merely that they shall be forthcoming when demanded, and that the sheriff cannot insist on the party removing them to any particular place within the district; and where, in such a case, the obligor had once delivered up the goods to the sheriff, the condition is performed; and if they be left in his hands, his refusing to give them up on a subsequent occasion cannot be set up as a breach of the condition. *Malloch v. Patterson*, i. U. C. R. 261.

[See div. II. 6, *infra*.]

Breach of condition in not having "duly rendered all accounts which ought to have been rendered"—*What monies recoverable thereunder.*—9. In an action on a bond for the breach of a condition, assigned in the words used in the bond, "in not having duly rendered all accounts which ought to have

been rendered"—the plaintiff may recover whatever monies the defendant ought to have received, though no money was in fact received by him. *Small v. Stanton*, iii. U. C. R. 148.

Bond for conveyance of land—Preparation of deed.]—10. Where by the terms of a bond the obligor was to convey in fee simple to the obligee: *Held*, that under this condition, it was incumbent on the obligor to prepare the deed and to tender the delivery of it to the obligee, on his paying the expenses thereon; and therefore, a plea by the obligor to such a bond, that the obligee did not prepare or tender the deed or expenses, was bad. *McDonald v. Switzsinger*, v. U. C. R. 312.

Bond securing fixed salary to a sheriff.]—11. A bond given to secure a sheriff a certain fixed salary, or otherwise, to be paid by his deputy, is void. *Foott v. Bullock*, iv. U. C. R. 480.

II. PROCEEDINGS.

See AMENDMENT, II. 6; III. 14.—

ARREST OF JUDGMENT, 6.—BAIL, II. passim.—BOND, I. 6.—DISTRICT COUNCIL, 6, 8.—EXECUTOR ETC., II. 6.—INDEMNITY BOND, 5, et seq. PAYMENT, 2, 6.—PLEADING, II. 1, 3, 33.—PRACTICE, I. 28.—SCIRE FACIAS, 6.—VARIANCE, 14, 15.—VERDICT, 11, 12.—WITNESS, 3.

Obligor executing in right name, but described in wrong name—How to be sued.]—1. An obligor who is called by a wrong name in a bond, but executed it by his right name, must be sued by the name in the bond. *Ketchum et al. v. Brady*, Mich. Term, 3 Vic.

Non est factum—Set off.]—2. Non est factum and a set off may be pleaded together, to debt on bond. *Atkins v. Clark et al.*, Mich. Term, 3 Vic.

Debt on bond—Irregular judgment—Leave given to amend, three years after judgment given.]—3. To debt on bond setting out the condition and

assigning breaches, the defendant cravedoyer and demurred, and the plaintiff having succeeded on the demurrer, entered judgment for the amount of the penalty in the bond and issued execution. The defendant then moved to set aside the proceedings, but the plaintiff had leave to amend, by substituting an interlocutory for the final judgment, and entering an award of venire to assess damages, and inquire of further breaches, although three years had elapsed from the entry of judgment. *Douglass v. Powell*, ii. O. S. 87.

When declaration commencement of action.]—4. Where in debt on bond for the payment of money in two instalments, only one was due when process issued, but the plaintiff assigned breaches for both, the time for payment of the second having arrived before declaration: *Held*, that he could assess his damages on both breaches; and *Semble*, in such a case the declaration is the commencement of the action. *Leach v. Stevenson*, iii. O. S. 310.

Declaration, common conclusion in bond being omitted—Plea, non-performance of a condition precedent.]—5. To debt on bond with a condition, in which it appeared onoyer that the common conclusion, "then this obligation shall be void," had been omitted, the defendant pleaded in avoidance, non-performance of a condition precedent, as if the bond had been regularly concluded, to which the plaintiff demurred generally: *Held*, that the plea was good. *Day v. Spafford*, Hil. Term, 6 Wm. IV.

Action by sheriff on bond of a party whose goods are seized, to deliver them on request—Pleadings.]—6. Where to debt on bond, with a condition that the defendant should permit or cause certain goods to be forthcoming at a day of sale, when and where the plaintiff should appoint, the defendant pleaded that he did permit and cause them to be forthcoming at a particular place,

The replication was held bad, the undertaking being in the alternative, and it being sufficient if the defendant permitted them to be forthcoming. *Miller v. Hamilton*, Hil Term, 4 Vic.

Necessity for replication being disjunctive in its wording.]—7.

Action on a bond.—Plea, that the bond was obtained from the defendant by Ham and others in collusion with him, by fraud, &c.—Replication, that the bond was not obtained by fraud of Ham and others in collusion, &c.—Demurrer, that the replication should have been in the disjunctive; but held by the Court, replication good. *Turner v. Ham*, vi. U. C. R. 255.

Condition for conveyance of land in life-time of testator—Action by executor—Plea.]—8. Partial performance of the condition is no answer to an action on a bond; and a plea to debt on a bond, with a condition to convey land in the life-time of a testator, brought by his executor, must negative the request of a conveyance to the heir or executor, as well as by the testator. *Hershey (Adam) v. Warren*, Hil. Term, 7 Wm. IV.

Remedy against obligor who has wrongfully torn off his seal.]—9. Trover may be maintained by the obligee against the obligor of a bond, who has wrongfully torn off his seal, and damages be recovered to the amount of the penalty. *The Bank of Upper Canada v. Widmer*, ii. O. S. 222.

Effect of admission of execution of a bond, on the necessity for its production at trial.]—10. Where a bond is pleaded with a profert, the admission of its execution, under a judge's summons for that purpose, does not dispense with the necessity for its production at trial. *Lesslie v. Leahy*, Hil. Term, 7 Wm. IV.

If something must be done after making of bond, it is sufficient if the thing must necessarily have been performed as the bond requires—Pleadings.]—11. Where in an action on a

bond, there is something to be performed according to the condition after the making of the bond, it will be sufficient if it appear that the thing must necessarily have been performed *after the making of the bond*, though these words be not used.

The condition of a bond was to collect and pay over monies.—Plea, that the defendant paid over all the monies collected, without shewing how much he collected: *Held*, sufficient. *Denison v. Donnelly*, ii. U. C. R. 395.

Condition for the discharge of an office for six months and longer if agreed to—Plea, performance—Replication, extension of time, not averring it to be made within six months.] 12.

In debt on bond the condition set out was for the performance of the office and duty of deputy sheriff for six months, and for such period as the sheriff and deputy should agree upon and indorse upon the bond, and in answer to a plea of non-performance the plaintiff replied setting out that the period had been extended, but did not aver that the extension was made during the period of six months—the replication was held bad. *Hamilton v. Anderson*, ii. U. C. R. 452.

[See a case somewhat similar, 18, *infra*.]

Separate agreement not sealed varying the condition, no defence to an action.]—13. To an action on a bond the defendant cannot set up as a defence a separate agreement not under seal, varying the condition from that which the bond itself imports, and alleged to have been entered into at the same time with the making of the bond. *Cramer v. Hodgson*, iii. U. C. R. 174.

Bond permitting the defendant to cut wood, &c.—Breaches.]—14.

Where in debt on a bond conditioned that “the defendant, his heirs and assigns should permit and suffer the plaintiff to cut down, take, and carry away all the fire-wood from certain lands, without let, suit, hinderance, or moles-

tation ;" the defendant pleaded that he always permitted, &c., and the plaintiff replied that after the making of the bond the defendant conveyed the land in fee to a stranger, who would not permit the plaintiff to cut the wood, &c., and the defendant demurred to the replication—the Court gave judgment for the demurrer, the replication having shewn no breach, the bond being a license under seal binding on the defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no obstruction. *Fowke v. Fothergill*, iv. O. S. 185.

Debt on bond for payment of rent—Plea of payment to the plaintiff's assignee.]—15. In debt on a bond conditioned to pay rent, a plea that before the rent became due the plaintiff assigned to A., to whom the defendant paid the rent, was held good on demurrer. *McDougall v. Young*, Dra. Rep. 118.

For payment of money—Declaration.]—16. Debt on a bond, with a condition to be void if certain payments should be made at the times stated in the condition, with an averment as a breach that 125*l.* parcel of the sum demanded was not paid, &c.—Demurrer to declaration: *Per Cur.*, declaration bad, in not negating the payment of the money mentioned in the condition. *Beckett v. Oill*, iv. U. C. R. 489.

Co-sureties to the Crown—Benefit of Crown process to one against the other.]—17. A. and B. entered as co-sureties into separate bonds to the Crown for C.; C. becomes a defaulter. The Crown proceeds by sci. fa. on each bond, and obtains a separate judgment against each surety.—A. satisfies to the Crown the judgment against himself.—B. moves the Court to be allowed, on paying the judgment against himself in full, to stand in the place of the Crown, and to have the benefit of the Crown process against his co-surety on a moiety of the judg-

ment: *Held*, that the Court will not thus relieve B. from the effect of the judgment against himself; all that they could have done would have been to allow him to proceed in the name of the Crown to enforce the judgment which had been obtained on a sci. fa. against A., and this they could not now do, as it appeared the Crown had already enforced that judgment. *Regina v. Land*, iii. U. C. R. 277.

Action on bond conditioned to account once in six months—Plea, that defendant did account, not expressly alleging once in every six months.]

18. Where the condition of a bond was to account for monies received once in every six months, and the defendant pleaded that he did account, &c., according to the terms and true intent and meaning of the condition—the plea was held bad on special demurrer, because it did not expressly allege that the defendant accounted once in every six months. *Small v. Beasley*, iii. U. C. R. 40.

Plea of non-damnificatus to a bond, not one of indemnity.]—19. The plea of non-damnificatus to a declaration on a bond containing specific conditions, is bad. *Kingsmill v. Gardiner et al.*, i. U. C. R. 223, and *McDonald v. May et al.*, v. U. C. R. 68.

20. *Quære*: Can the defendant, after treating the bond as an indemnity bond by his pleas, object to the plaintiff's right to recover on the insufficiency of the pleadings on the record? *McDonald v. May et al.*, v. U. C. R. 68.

Averment of non-performance or performance of a condition, bad, if the condition be not stated with certainty.]

—21. Where the plaintiff had bound himself to advance money to A. upon certain conditions, and the defendant had in the same bond guaranteed the plaintiff the re-payment of such advance, the plaintiff in suing the defendant upon the bond for the non-fulfilment of his guarantee, should set out

with certainty what the conditions were on which A. was to obtain the money from him (the plaintiff), as otherwise, no certain issue could be taken upon the question whether A. had performed the condition or not, or whether the plaintiff had done what he agreed to do—viz., to advance the money upon the conditions agreed upon. The simple averment, therefore, that A. had not kept all the conditions on his part, without stating what the conditions were, is bad. A. plea also stating that the plaintiff had not kept all the conditions on his part, when it nowhere appeared what they were, is also bad. Where the plaintiff by his bond was either to "secure or advance" the money, a plea stating that the plaintiff had not "secured and advanced," is bad. *Wright v. Benson*, v. U. C. R. 249.

Action on bond conditioned to pay over monies collected in 1846, before December of that year—Plea, that monies were paid quarterly, in accordance with a by-law.—22. To an action of debt on bond against the collector of a township and his sureties, for not paying over to the treasurer of the district all monies that he should collect in the year 1846, on or before the first Monday of December in that year, the defendant pleads, that by a certain by-law of the District Council passed in May 1843, it was enacted that the collector should pay his monies to the treasurer quarterly, which he did: *Held*, on demurrer to plea, plea bad as being no answer to the conditions of the bond. *Baby v. Drew et al.*, v. U. C. R. 556.

Declaration on bond—Averment of breach.—23. The plaintiff sues on a bond, sets out the condition and alleges a breach, but not a breach of the condition—the declaration is bad on such a case. *Crysler v. Eligh*, i. U. C. R. 227.

BOND TO THE LIMITS.

See LIMITS, II.

BOOKS.

See CORPORATION, 1.—DISTRICT COUNCIL, 11, 15.

BOUGHT AND SOLD NOTES.

When to be treated as an actual sale.—Bought and sold notes, like the one in this action, may be treated as an actual sale, though the fact may or may not be that the one party has not at the time a specific lot of the article in his possession, and actually set apart for the particular vendee. *Brunskill v. Chumaseo et al.*, v. U. C. R. 474.

BOUNDARY.

See BOUNDARY LINE COMMISSIONERS, *passim*.—EJECTMENT, VIII. 21, 22. MAINTENANCE (STATUTE OF), 13. MANDAMUS, 16.—NEW TRIAL, III. 3.

BOUNDARY LINE COMMISSIONERS.

See MANDAMUS, 10.—TRESPASS, II. 22.

Authority over leaseholds—Appeal.—1. Boundary line commissioners have no authority in cases of leaseholds; and in appeals from their decisions, the party appealing must bring the case before the Court for argument by concilium. *Vanderlip v. Mills*, Hil. Term, 3 Vic.

Power to establish new concession lines.—2. Boundary line commissioners have no power to establish new concession lines, varying from those which have existed for upwards of fifty years. *Detlor, In re*, Trin. Term, 3 & 4 Vic.

Power to cause surveys to be made.—3. Boundary line commissioners

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have authority to cause surveys to be made when the boundaries of lots are in dispute. *Osman v. Garder*, Hil. Term, 4 Vic.

Power to establish side lines.]—4. Boundary line commissioners have no power to establish the side lines between lots which are at neither end of the concession, as the governing side lines of the several lots in the concession. *Morgan et al. v. Simpson et al.*, Easter Term, 4 Vic.

Duty in determining side lines.]—5. Boundary line commissioners in determining the side between lots, are bound by the rule laid down by 59 Geo. III. ch. 14, that such side lines shall correspond with the course of the side lines of the township on that side from which the lots are numbered. *DeLong et al. v. Striker et al.*, Easter Term, 4 Vic.

6. Boundary line commissioners in establishing the division lines between lots in the same concession, are bound by the provisions of 59 Geo. III. ch. 14, and must ascertain the true line of the township at the end of the concession from which the lots are numbered, and take the course of that as the true course of the side line which they are requested to establish; and they must also shew in their award the course of the line run to mark the boundary, and the position of the point of departure, or their award will be defective and void. *Caldwell v. Wright et al.*, Easter Term, 5 Vic.

Award.]—7. An award made under the Boundary Line Commissioners' Act, 1 Vic. ch. 19, on a subject within the jurisdiction of the commissioners, in which both parties interested were heard, and which had not been appealed against, was held to be conclusive between those parties. *Havens v. Donaldson*, i. U. C. R. 371.

[The Boundary Line Commissioners' Act having expired in 1842, no proceedings can now be had under it.]

BUILDER AND BUILDING.

BREACH OF DUTY.

See ATTORNEY, II(1), passim.—MANDAMUS, 20.—MASTER AND SERVANT, 5.

BREACH OF FAITH.

See ATTORNEY, II(1), 6.—COUNSEL, 3.

BREACH OF PROMISE OF MARRIAGE.

See ARREST OF JUDGMENT, 7.—COSTS, I(1), 8.

BREACH OF THE PEACE.

See ARREST, IV. 14.—ASSAULT AND BATTERY, 3.—TRESPASS, II. 20.

BRIEFS.

See ATTORNEY, II(1), 1.—COSTS, VI. 4: VIII. 11.

BROCKVILLE (TOWN OF).

See QUO WARRANTO, 1.

BUBBLE ACTS.

The Bubble Acts 6 Geo. I. ch. 18, and 14 Geo. II. ch. 37, are not in force in this province, and banks chartered by act of the Provincial Parliament could not come within the provisions of those acts. *Bank of Montreal v. Bethune*, Easter Term, 5 Wm. IV.

BUILDER AND BUILDING.

See CONTRACT, 8, 9.—LIEN, 1.—PLEADING, II. 14, 32.—TORONTO (CITY OF), 1.

BUILDING SOCIETIES.

Construction of act 9 Vic. ch. 90.]
—Under the 12th section of 9 Vic. ch. 90, the president and treasurer of the building societies may sell in their proper names without further description. *Doe dem. Barwick et al. v. Clement*, vii. U. C. R. 549.

BUYING DISPUTED TITLES.

See MAINTENANCE (STATUTE OE).

BY-LAWS.

See BILLIARD TABLES, 1, 2.—BOND, II. 22.—CONVICTION, 4.—DISTRICT COUNCIL, 16, 17.—LONDON (TOWN OF), 1.—TORONTO (CITY OF), 1, 2.

Justices of the peace levying penalties by distress.]—1. Where a statute gives justices of the peace power to make by-laws and impose penalties for their infraction, they cannot, unless expressly authorized by the statute, levy such penalties by distress. *Kirkpatrick v. Askew*, Hil. Term, 7 Wm. IV.

Annexing penalties for infraction of by-laws.]—2. Where a corporation is empowered by statute to enact by-laws and to enforce a penalty for their infraction, not exceeding a certain amount, a by-law is bad which annexes a penalty to an offence, but does not declare its amount. *Peters v. The London Board of Police*, ii. U. C. R. 543.

CANADA COMPANY.

Service of process.]—Process to compel the appearance of the Canada Company could not be served on the commissioners in this province. *Cooper v. The Canada Company*, Easter Term, 1 Wm. IV.

CANALS.

See RIDEAU CANAL.—ST. LAWRENCE CANAL.—WELLAND CANAL.

CANCELLATION.

I. OF NOTES.

See BILLS OF EXCHANGE ETC., I. 14; IV. 7, 10, 19; VII. 14.

II. OF WILLS.

See WILL, 9.

CAPIAS AD RESPONDENDUM.

See AMENDMENT, I. 5, 6.—ARREST, I.; III. passim.—CONSTABLE, 3, 4, 5, 6.—DOWER, II. 9.—INDORSEMENT, I.—SHERIFF, I. 2, 3.

Teste.]—1. A writ of ca. re. issued in vacation must be tested the last day of the preceding term. *Armstrong v. Scobell*, Mich. Term, 4 Wm. IV.

2. Aailable writ of ca. re. must be tested in the name of the chief justice, or in his absence, in the name of the senior puisne judge. *Case v. McVeigh*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

[See AMENDMENT, I. 5.]

Irregularity.]—3. A writ issued on the last day of one term, but issued on an affidavit made after the first day of the following term, is an irregularity. *Westover v. Burnham*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Testatum to Home District.]—4. It is not irregular to issue a testatum writ of ca. re. to the Home District, as upon an original writ to an outer district. *Patterson et al. v. Calvin et al.*, i. U. C. R. 409, P. C. Hagerman, J.

Setting aside, for irregularity—Costs.]—5. On motion to set aside a ca. re. for irregularity, costs will be given, although the defendant has asked for more than the Court can

grant, as that a bail bond shall be delivered up when no bail bond has been given. *Armstrong v. Scobell*, iii. O. S. 303.

[The original non-bailable process, in every case, is now a writ of summons; and a ca. re. is only sued out where the defendant is to be arrested.]

CAPIAS AD SATISFACIENDUM.

See AMENDMENT, I. 2, 3; III. 14.—ARREST, I.; II. 13; III. passim.—BAIL, III. 4, 11.—INDORSEMENT, I. POUNDAGE ETC., 5.—SCIRE FACIAS, 4.

Affidavit made in Lower Canada.]

—1. The Court will allow a capias ad satisfaciendum to issue on an affidavit sworn before a judge in Lower Canada, whose signature is verified by affidavit here. *Coit v. Wing*, iii. O. S. 439.

For costs of defence.]—2. A defendant is entitled to a writ of capias ad satisfaciendum for the costs of his defence. *Thompson v. Leonard*, iii. O. S. 151.

Affidavit—Deponent's name.]—3. It is not necessary in an affidavit made for the purpose of issuing out a capias ad satisfaciendum by a plaintiff, who has two christian names, to state the second, where his identity sufficiently appears by the affidavit describing him as the above plaintiff. *Perkins v. Conolly*, iv. O. S. 2.

After return of devastavit.]—4. On a return of "devastavit," a ca. sa. does not issue as a matter of course without enquiry. *Willard v. Woolcut*, Dra. Rep. 211.

[If an executor plead to an action, and do not plead plene administravit, the judgment is evidence of a devastavit. *Palmer v. Waller*, 1 M. & W. 689.]

Issued several terms after return of execution against goods.]—5. It was considered no ground for setting aside

an arrest on a capias ad satisfaciendum, that several terms had elapsed after the return of the execution against goods before the capias ad satisfaciendum issued. *Glynn v. Dunlop*, iv. O. S. 111.

Issue of ca. re. and of ca. sa. afterwards, without a second affidavit.]—6. Where a plaintiff sued out a capias ad respondendum, and without executing it took a cognovit and entered common bail and judgment against the defendant, and arrested him on a capias ad satisfaciendum, without filing a fresh affidavit—the capias ad satisfaciendum and arrest were set aside with costs. *Brown v. Bethune*, Mich. Term, 6 Wm. IV.

Against two defendants after judgment, though one served with non-bailable process.]—7. Where one of two defendants had been arrested, and the other served on mesne process, the Court, after judgment, allowed a capias ad satisfaciendum to issue against both, with a direction only to be executed against the one who had been originally arrested. *McIntyre v. Sutherland et al.*, Easter Term, 6 Wm. IV.

Against a person suffering judgment of non-pros.]—8. A defendant may, upon the affidavit required for the arrest of debtors, issue a ca. sa. against a plaintiff who has suffered judgment of non-pros. *Johnson v. Smadis*, Tay. U. C. R. 174.

Discharge from first ca. sa. under misapprehension—Second not issuable.]—9. Where the defendant had been discharged from custody on a writ of capias ad satisfaciendum by the partner of the plaintiffs' attorney, under the supposition that the debt for which the defendant had been arrested had been compromised by the acceptance of new securities by the plaintiffs, but it afterwards appeared that the plaintiffs had not accepted the securities—the Court refused to order that a new writ of capias ad satisfaciendum should

be issued. *Bradbury et al. v. Loney*, Hil. Term, 5 Vic.

Mesne process set aside—Final process on new affidavit.]—10. Where a defendant had been arrested on mesne process, which was set aside for irregularity, and the plaintiff afterwards proceeded to judgment: *Held*, that he might again arrest on a capias ad satisfaciendum issued on new affidavit. *Gordon v. Sommerville*, Mich. Term, 7 Vic., P. C. Jones, J.

Rights and duties of deputy clerks of the crown upon issuing alias writs of.]—11. An alias writ of capias ad satisfaciendum may be issued by a deputy clerk of the crown in an outer district; and it is no ground for setting aside such writ that the deputy has not transmitted the affidavit and precept for the capias ad satisfaciendum, within one month after they were filed, to the principal office, according to the statute. *Scott et al. v. Macdonald*, Mich. Term, 7 Vic.

On affidavit filed before Insolvent Act.]—12. A writ of capias ad satisfaciendum cannot be issued since the Insolvent Act upon an affidavit filed under the former law, at the commencement of the suit. *Sewell v. Dray*, ii. U. C. R. 179.

Necessity of stating amount of debt.]—13. A capias ad satisfaciendum, commanding the sheriff to detain the defendant in custody until he should satisfy the plaintiff, without stating the amount of debt to be recovered, is void. *Henderson v. Perry et al.*, iii. U. C. R. 252.

CARGO.

See CARRIER, 10, 11.

CARRIER.

See ASSUMPT, II. 8.—DEMURRAGE, 1, 2.—VENUE, 8.

Forwarder.]—1. A forwarder is a common carrier, and not liable for loss arising from the act of God or the King's enemies. *Smith v. Whiting*, iii. O. S. 597.

Liability of owners of a vessel, for the loss of goods shipped on such vessel.]—2. The owners of a vessel, mortgaged, and in the possession of, and navigated by the mortgagee, are not liable for the loss of goods shipped on such vessel; and if they were liable, although the form of action were case, yet, as their liability would be founded on contract, and not custom, the acquittal of one defendant would discharge the rest. *Wilkes v. Flint et al.*, iv. O. S. 19.

Duty in delivering goods.]—3. It is sufficient to discharge the owner of a vessel conveying goods from port to port, from liability arising from non-delivery of those goods, to show that they were delivered by the master of the vessel at the port to which they were consigned, and notice given during the usual business hours to the consignee. *McKay v. Lockhart*, Hil. Term, 6 Wm. IV.

Construction of bill of lading.]—4. Where in a bill of lading it was stated that the deck load was to be at the risk of the owners: *Held*, that the construction of the bill was for the court and not for the jury, and that the words imported that the risk was to be that of the owners of the goods, and not the owner of the vessel. *Merritt v. Ives et al.*, Mich. Term, 4 Vic.

Liabilities as warehousemen or carriers.]—5. Where in an action against common carriers from Kingston to Montreal it was proved that the plaintiff had sent his goods to the defendants at a season of the year when they could not be forwarded, and the defendants received them into their store at Kingston to be forwarded at the earliest opportunity—and before the navigation had opened, or time for transportation had arrived, they were

destroyed in the defendants' storehouse without their default, by an accidental fire, and a verdict was found for the plaintiff: *Held*, that it ought to have been distinctly left to the jury to find whether the defendants received the goods only as warehousemen until the opening of the navigation, or whether their liability as carriers commenced from the moment of their receipt, and it not having been so left to them, the Court granted a new trial. *Ham v. McPherson et al.*, Easter Term, 5 Vic.

[See case 12, *infra*.]

Construction of bill of lading.—6. Where the owner of a vessel undertook by his bill of lading to carry goods without any exception as to the damages of the navigation or otherwise, and the goods were lost in a violent tempest: *Held*, that the owner was not liable. *Warren v. Wilson*, Trin. Term, 5 & 6 Vic.

Forwarder—Directions.—7. Construction of a contract entered into between the consignor and forwarder of goods, as to the discretion the forwarder may use in the time, mode, and place of shipping the goods. See *Fowler v. Hooker et al.*, iv. U. C. R. 18.

Deviation from instructions.—8. It is no defence for a forwarder deviating from his instructions, that after the deviation he told the plaintiff's agent he had done so and no objection was made by the agent. *Aliter*—if he told the agent of his intention before the deviation and could shew that the agent had any discretion in the matter. *Ib.*

Defence of false invoices.—9. It is no ground of defence to a common carrier by water for not carrying goods safely from a foreign country, or on a claim for general average, that the owner of the goods had prepared false invoices to defraud the revenue laws of this province. *Grousette v. Ferrie*, Mich. Term, 6 Vic.

Deck cargo—Liability of ship-owner for loss.—10. Where it is the usage of the trade to carry a deck cargo in inland navigation, and such usage is known to the shipper, he cannot hold the master or owner responsible for a part of the deck cargo swept off in a storm, the bill of lading excepting the dangers of navigation. *Stephens et al. v. McDonell*, Mich. Term, 6 Vic.

11. Whether in case of loss of cargo loaded on deck the ship-owner will be liable, depends on the usage which prevails in respect to deck loading in the particular navigation. *Paterson v. Black*,] v. U. C. R. 481.

Distinction between warehousemen and carriers.—12. *Held* on a subsequent trial of *Ham v. McPherson et al.*, (above, case 5), that it was a question for the consideration of the jury, whether the defendants received the goods as carriers or warehousemen, and that the circumstance of the navigation being closed by the ice every year at the season of the receipt of the goods, and also at the time of the fire, did not necessarily determine as a matter of law, that the defendants must be looked upon as having acted in their character of warehousemen only. *Ham v. McPherson et al.*, Hil. Term, 6 Vic.

[See case 16, *infra*.]

Coach proprietor—Liability for accidents to passengers.—13. In an action against a coach proprietor for an injury done to one of his passengers by the upsetting of his coach; it is no misdirection to inform the jury that unless the driver exercised a sound discretion at the time the accident happened the owner is responsible; and if he could have exercised a sounder judgment or better discretion than he did, as by driving slower or faster, or by directing his passengers to get out at any dangerous or difficult passage, the proprietor is liable to make com-

pensation for the injury sustained. *Stanton v. Weller*, Hil. Term, 6 Vic.

Negligence—Carelessness in driving—Evidence.—14. In an action against the proprietors of a railroad car for an accident that happened to the plaintiff in consequence of the carelessness of one of their drivers, an averment in the declaration that the contract was to carry *safely*, is supported by proof that the accident arose from the driver's want of care and skill. *Thompson v. Macklin et al.*, ii. U. C. R. 300.

Duty of forwarders.—15. A warehouseman receiving goods to forward, discharges his undertaking, and consequent liability, by delivering them properly directed to the master of a steamer or other vessel, on board of his vessel engaged in the carrying trade between the place at which the goods were received and the place to which they are to be forwarded; and averring in the declaration that he received the goods to be forwarded by him, does not charge him as a common carrier. *Beckett v. Urquhart*, i. U. C. R. 188.

Distinction between carriers and warehousemen.—16. Where flour was delivered to the defendants, who were warehousemen and common carriers, with directions to sell such portions of it as they could during the winter, and put the remainder in transitu for the plaintiff in the spring, and some sales having been made before the navigation opened in the spring, an accidental fire destroyed the remainder of the flour without any default or negligence of the defendants: *Held*, that as the flour at the time of the fire was in the hands of the defendants as warehousemen, and not as common carriers, they were not responsible for its loss. *Thirkell v. McPherson et al.*, i. U. C. R. 318.

Common carrier—What constitutes—17. A person engaging to transport goods for hire is not, by virtue of such engagement merely, a common

carrier, and as such, liable for all accidents, whether negligent or not. *Benedict v. Arthur*, vi. U. C. R. 204.

Action against carriers for neglect of duty—Inadmissible defence.—18. In an action on the case (by the plaintiffs in ejectment) against A. and B. as common carriers, for not delivering within a reasonable time the record of Nisi Prius at the assize town: *Held*, that it was not competent for the defendants to put in issue the plaintiffs' title to the land. *Parke et al. v. Davis et al.*, vi. U. C. R. 411.

Action against several carriers—Plea.—19. Where several defendants are charged as common carriers in case, and they plead traversing only the delivery to them of the parcel, without saying "or any or either of them:" *Held*, plea good. *Ib.*

CASE, (ACTION ON THE).

See ACTION, 1, 3.—APPRENTICE, 2. BAILIFF, 3.—BAILMENT, 1.—CARRIER.—DEMURRAGE, 2.—DISTRESS II. 2, 7.—DISTRICT COUNCIL, 8.—EASEMENT, 3, 4, 5, 6.—FALSE RETURN.—FERRY, 1, 3, 4, 6.—LEASE, II. 2.—LIBEL AND SLANDER.—LIMITATIONS (STATUTE OF), IV. 4.—MALICIOUS ARREST.—MALICIOUS PROSECUTION.—PLEADING, I. 11.—SHERIFF, III. 1, 8; IV. 5. TAXES, 8.—WARRANTY.—WASTE. WATER, 4, 5.

Declaration, claiming damages for an injury committed or continued after commencement of action.—1. *Semble*: That in an action on the case, a declaration would be open to special demurrer in claiming damages for an injury stated to have been committed, or at least continued, after the action had been commenced. *Watson v. The City of Toronto Gas-light and Water Company*, iv. U. C. R. 158.

For not manufacturing wheat into flour—Common counts.—2. *Semble*:

That if in an action upon the case for not manufacturing four hundred bushels of wheat into flour, the plaintiff recover damages equal to the value of the wheat delivered to the defendant, he cannot bring an action for goods sold for part of the wheat which had, in point of fact, been re-delivered to the plaintiff; and that such re-delivery should have been given in evidence in mitigation of damages; and that an action upon the common counts could not at any rate be sustained in such a case. *Andrus v. Burwell*, Tay. U. C. R. 526.

By locatee of the Crown for an injury to the land before patent.—3. A locatee of the Crown before patent issued may maintain an action on the case against a stranger for an injury done by him to his land by flooding; but where an order in council has been made that no deeds should issue from government for lands in a particular part of the township, without a special reservation to the defendant of a right to flood certain portions of that land: *Held*, that a locatee of the Crown could not maintain an action for the flooding of a portion of those lands by the defendant, as he would in such a case be in a better position before grant from the Crown than afterwards. *Miller v. Purdy*, Hil. Term, 6 Vic.

Declaration for malfeasance or non-feasance—Plea amounting to general issue.—4. Where the plaintiff declared in case for an injury done to his horses by falling into a hole made in a public highway by the water overflowing a mill dam of the defendants and tearing up the road, by which it was alleged that it was the duty of the defendants to fill up the hole or fence it round, so as to prevent accidents, and the defendants pleaded that the plaintiff was driving the horses at the time, that it was through his own carelessness and negligence, and of his own wrong that they fell into the hole, the plea was held bad on special de-

murrer, as amounting to the general issue; but the declaration was also held to be insufficient, as it ought to have been framed for the malfeasance in erecting or continuing the dam &c., and not for the nonfeasance which was complained of in not filling up or fencing around the hole. *Nellis v. Wilkes et al.*, i. U. C. R. 46.

For collusion.—5. An action on the case will lie against a party who has collusively obtained from his debtor a confession of judgment for a larger sum than is really due to him, under which the debtor's property has been sold in execution; and it may be maintained by any creditor of the debtor who has been injured by these collusive proceedings between the first creditor and the debtor. *Ley v. Maddill*, i. U. C. R. 546.

False representation—Declaration and pleadings.—6. Declaration on the case for falsely alleging that a certain hotel stood upon the land of the defendant, whereby the plaintiff was induced to purchase the defendant's land—the defendant well knowing that the hotel was not on his land, but on the other land—to wit, lands adjoining to the defendant and belonging to the Queen. Pleas, 1st.—That the said hotel was not erected upon the land of the Queen &c. 2nd.—That the plaintiff had notice and was well aware that the false representations &c. were false, and if damned thereby, he was damned of his own wrong and through his own default: *Held*, both pleas bad. *Held also*, on exceptions taken to the declaration, (which is given at full length in the report), declaration good in substance, though loosely framed. *Tennery v. Stiles*, v. U. C. R. 254.

Case for maliciously suing out a commission of bankruptcy—Necessary averments in declaration.—7. In an action for maliciously suing out a commission of bankruptcy against the plaintiff it should be distinctly averred

in the declaration that the defendant acted without cause—the averment that the defendant falsely and maliciously swore to the debt, is not sufficient. The declaration should also state that the commission of bankruptcy issued upon the affidavits set out, and that the affidavits were made before a competent authority. It should also be averred that the commission was superseded before the action was commenced. *Locke v. Wilson*, vi. U. C. R. 600.

Conspiracy in supplanting another purchasing goods—Averment of malice.—8. An action on the case in the nature of a conspiracy does not lie against a person supplanting another in the purchase of goods which had first been contracted for by the latter party; and in every action on the case in the nature of a conspiracy the declaration must expressly aver *malice* on the part of the defendant. *Davis v. Minor et al.*, ii. U. C. R. 464.

Injury arising from mill dam—Proof.—9. The description of injury complained of in the declaration by the erection of a mill dam, must be substantially proved as laid in some one of its counts. *McNab v. Adamson*, vi. U. C. R. 100.

Liability of party kindling fires on his land in clearing.—10. A person kindling a fire on his own land for the purpose of clearing it, is not liable at all risks for any injurious consequences that may ensue to the property of his neighbors. *Dean v. McCarty*, ii. U. C. R. 448.

[See several precedents in this action referred to in M. & W. Index, "Case (action on the), 16," page 154 of the Philadelphia edition.]

CASSETUR BILLA.

After judgment for the defendant on demurrer to a plea in abatement, and leave to amend on payment of costs, it is irregular for the plaintiff to enter a

cassetur billa before the costs are paid. *Commercial Bank v. Jarvis et al.*, Easter Term, 5 Vic.

CERTAINTY IN PLEADING.

See PLEADING, II.

CERTIFICATES.

See BANKRUPT ETC., 1, 9.—CLERK OF THE CROWN AND PLEAS, 1, 2.—COSTS, VII. 4, 7.—CUSTOMS ACTS, 1.—DEED, III. 11, 12.—EVIDENCE, V. 1.—JURY, 5.—MORTGAGE, 8.

CERTIORARI.

See ATTACHMENT, I. 2.

Judgments.—1. A judgment for the defendant against the plaintiff, cannot be removed from a district court into the King's Bench, under 19 Geo. III. ch. 70, sec. 4. *Gregory v. Flannegan*, ii. O. S. 518.

To inferior court after verdict.—2. A certiorari will not lie to an inferior court, a district court for instance, after verdict, although the Court may be of opinion that evidence which has been rejected by the judge below, should have been received by him on the trial of the cause. *Tully v. Glass*, iii. O. S. 149.

Removing cause from District Court to Queen's Bench.—3. A writ of certiorari under the 19 Geo. III. ch. 70, may issue in this province, for the purpose of removing a cause from a district court into the Queen's Bench. *Baldwin et al. v. Roddy*, iii. O. S. 167.

Costs under.—4. Where the judgment of a court of requests had been removed into this Court by certiorari, and set aside upon the application of the defendant, without any interference on the part of the plaintiff—the Court refused to grant an attachment against

him for non-payment of costs of removing the proceedings. *Cramer v. Nelles*, Tay. U. C. R. 39.

Lies to remove orders of Sessions.
—5. A writ of certiorari lies to remove orders of sessions relating to the expenditure of the district rates and assessments, at the instance of the Attorney General, without notice. *Rex v. Justices of Newcastle District*, Dra. Rep. 121.

Proceedings after removal of cause.
—6. The Court will not direct how proceedings are to be carried on, after the removal of a cause from a district court to the Queen's Bench. *Copping v. McDonell*, Trin. Term, 6 & 7 Wm. IV.

CHAMBERS.

See JUDGE (IN CHAMBERS), 1, 2, 3, 5, 6.

CHANGING VENUE.

See VENUE, 1, 4, 5, 6, 8, 10.

CHARGING IN EXECUTION.

See BAIL, III. 4.

CHARITABLE USES.

See MORTMAIN.

CHATTELS.

See ASSUMPSIT, I. 7; II. 6.—DISTRICT COURT, 13.

CHEQUES.

See MONEY HAD AND RECEIVED, 9, 10.—MONEY LENT.

CHILD.

See PARENT AND CHILD.

CLERK OF CROWN AND PLEAS.

CHRISTIAN NAMES.

See ARREST, I. 3, 29.—BILLS OF EXCHANGE ETC., V. 30, 31, 32, 34, 35. PLEADING, II. 35.

CHRISTMAS DAY.

See BILLS OF EXCHANGE ETC., II. 14.

CHURCH TEMPORALITIES ACT

See WILL, 11, 12, 13.

CLERGY RESERVES.

4 & 5 Vic. ch. 100, sec. 18.]—The 18th clause of the provincial act 4 & 5 Vic. ch. 100, does not apply to clergy reserves. *Byers v. Moore*, v. U. C. R. 4.

[See also, *Doe dem. Weisenberger v. McGlennon*, v. U. C. R. 138.]

CLERK.

See ATTORNEY, I.—AUCTION AND AUCTIONEER, 1.

CLERK OF ASSIZE.

See SUBPENA, 2, 3.

CLERK OF THE CROWN AND PLEAS.

Certificate under 10 & 11 Vic. ch. 15, to sheriff to admit to limits.]—1. Under the 10 & 11 Vic. ch. 15, sec. 5, the Court will not direct the clerk of the Crown and Pleas to give the certificate to the sheriff to admit a prisoner to the limits, without the clerk is first satisfied that notice of bail for that purpose has been given to the plaintiff in the action, so that he might, if he had chosen, have excepted to them in due time, before justification. *Mills v. James*, v. U. C. R. 216.

Bail-piece—Certificate.—2. The bail-piece need not set out the writ on which the defendant has been arrested; it is not therefore necessary that the certificate of the clerk of the Crown and Pleas, of the defendant having filed a recognizance of bail, (under 10 & 11 Vic. ch. 15, sec. 5,) should state the writ on which the defendant has been arrested. *White v. Petch et al.*, vii. U. C. R. 1, P. C. Draper, J.

CLERK OF THE DIVISION COURT.

See DIVISION COURT, 4, 5, 6.

CLERK OF THE PEACE.

See DISTRICT COUNCIL, 4, 5, 17.—MANDAMUS, 19.

Not entitled to fees unauthorized by statute.—1. A clerk of the peace cannot charge fees for any service, for the remuneration of which no provision is made by the statute 43 Geo. III. ch. 11, or otherwise. *Askin v. London District Council*, i. U. C. R. 292.

Salary in lieu of fees.—2. If a clerk of the peace accept a salary in lieu of all fees, he is not afterwards entitled to any remuneration except such salary. *Ib.*

CLIENT.

See ATTORNEY, IV. 5, 6, 9.

COACHES.

See CARRIER, 13, 14.

COBOURG HARBOR COMPANY.

Not liable for goods left on the wharf and lost.—The Cobourg Harbor Company are not wharfingers, because they have erected piers and

wharves according to their charter, and are not therefore responsible for loss or damage sustained by persons whose goods have been left upon their wharves unstored. *Logan v. The Cobourg Harbor Company*, iii. U. C. R. 55.

COGNOVIT.

See ABSCONDING DEBTOR, 10.—BANKRUPT ETC., 2, 3, 5.—CASE (ACTION ON THE), 5.—ESTOPPEL, 6.—EXECUTION, 4.—EXECUTOR ETC., I. 8; III. 6.—FRAUDULENT DEED ETC., 5. JUDGMENT, 2 to 13, inclusive.—PARTNERS ETC., 1, 2.—PRINCIPAL AND SURETY, 4.—USURY, 4.—WITNESS, 1.

May be taken although no process issued—Arrest.—1. A cognovit may be taken in a cause although no process has issued; and a defendant who has given a cognovit without process, with a stay of execution to a certain day, may be arrested on a capias ad respondendum before that day has arrived, the taking of the cognovit not depriving the plaintiff of his usual remedies. *Walton v. Hayward*, ii. O. S. 468.

Cognovit by bail under misapprehension—Stay of proceedings upon affidavit of merits.—2. Where one of the bail to the sheriff had, in consequence of the defendant's leaving the province, and under an apprehension that he would not return to defend the cause, given a cognovit in his own name to the plaintiff—the Court, upon an affidavit of merits, stayed the proceedings upon the cognovit. *Roberts v. Hasleton*, Tay. U. C. R. 35.

Costs in such a case.—3. Where the defendant, one of the sheriff's bail, had, from misapprehension, given the plaintiff in the original action a cognovit, and had moved for and obtained an order to stay proceedings upon it until the action against the principal could

be tried, which order was conditioned "upon payment of all costs incurred by proceedings against the sheriff's bail"—the Court determined that the costs of the proceedings upon the cognovit should be considered as such costs. *Hasleton v. Brundige*, Tay. U. C. R. 105.

Execution by debtor in custody.]

—4. Where a debtor in custody executes a cognovit, it is not necessary that an attorney should be present on his behalf. *Lodor v. Heathcote*, Hil. Term, 7 Wm. IV.

Indorsing of attorney's name.]

—5. The rule requiring the name of the attorney to be indorsed upon a cognovit, does not apply where an attorney is plaintiff. *M'Lean v. Cumming*, Tay. U. C. R. 240.

6. Where a blank cognovit with the name of the plaintiff's attorney indorsed, was executed by the defendant, but neither the attorney nor any of his clerks were present at the execution, the cognovit was set aside with costs. *Jones v. Barnes*, Trin. Term, 7 Wm. IV.

7. Where after action brought, a confession of judgment was prepared by the plaintiff's attorney, and sent to the plaintiff at his request, with a blank for the sum for which the confession was to be given, and the sum was filled in by the plaintiff, and the confession executed by the defendant, without the attorney or any of his clerks being present—the rule of Easter Term, 9 Geo. IV., (requiring the intervention of a practising attorney, for the taking of cognovits), was held to have been sufficiently complied with. *Thompson v. Zwick*, i. U. C. R. 338, P. C. McLean, J.

8. If a cognovit be prepared by an attorney and his name be indorsed on it at the time of execution, it is a sufficient compliance with the rule of Court, Easter Term, 9 Geo. IV., although the cognovit be afterwards executed in the plaintiff's counting house,

when his attorney is not present. *Clarkson v. Miller*, ii. U. C. R. 96, P. C. Jones, J.

[In deference to the above cases, (numbers 7 & 8), Mr. Justice Sullivan, came to the same decision in *Paterson v. Squires et al.*, 1 Ch. Rep. 234, though the learned Judge is reported to have remarked, "that if he had to decide the point in the first instance, he should have hesitated in coming to the same conclusion," as in those two cases.]

As additional security.]

—9. A plaintiff giving time of payment to the defendant, by accepting several promissory notes, to become due at distant days, may, at the same time, as an additional security, take a cognovit for the whole amount of his debt, with power to issue execution thereon at any moment in his discretion. *Parker et al. v. Roberts*, iii. U. C. R. 114:

Restricted by verbal agreement.]

—10. A verbal agreement, however, entered into between the parties at the time of the cognovit being given, restricting such power, will be acted upon by the Court. *Ib.*

11. The fact that none of the notes had become due at the time of the cognovit being put in force, will not affect the judgment or execution on such cognovit. *Ib.*

Intituling.]

—12. Where the plaintiffs are styled, in proceedings taken upon a cognovit, in the same manner as they are named in the cognovit itself, the defendant having recognized the plaintiffs' names in his cognovit, cannot object that the christian and surnames of the plaintiffs have not been used in the proceedings. *Ib.*

Fraudulent against heir, given by administrator.]

—13. Where an administratrix conveyed lands of the intestate to his creditor, and gave him a cognovit to enable him to sell the lands to perfect his title, without taking out an execution against goods—the Court set aside the judgment and execution, as collusive against the heir. *Ward v. M'Cormack*, Mich. Term, 5 Vic.

COIN.

See CURRENCY.

COLLATERAL SECURITIES.

See BILLS OF EXCHANGE ETC., VII. 8, 9.—COGNOVIT, 9.—DEBT, 4.—DEED, II. 14.

COLLECTOR OF CUSTOMS.

See CUSTOMS ACTS.

COLLECTOR OF TAXES.

See BOND, I. 7; II. 22.

COLLEGES.

See KING'S COLLEGE.

COLLOQUIUM.

See LIBEL AND SLANDER, II. 3; III (1), 5.

COLLUSION.

See CASE, 5.—EJECTMENT, V. 5, 9; VIII. 14.

COLOR IN PLEADING.

See DE INJURIA, 2, 3.

COMMENCEMENT OF ACTION.

See BILLS OF EXCHANGE ETC., VIII. 4.—BOND, II. 4.—EVIDENCE, IV. 5.

COMMISSARIAT DEPARTMENT

See ORDNANCE DEPARTMENT.

COMMISSION TO EXAMINE WITNESSES.

Return under the hand of the commissioner, sufficient—Affidavit of execution, before whom to be made.]—1. The return of a commission to examine witnesses, sent to a foreign country, under 2 Geo. IV. ch. 1, secs. 17 & 18, under the hand, but not the seal, of the commissioner, is sufficient; and the affidavit of the execution of the commission may be sworn by the commissioner himself. *Beach v. Odell*, iv. O. S. 8.

Where one party to a cause obtains a commission, the other can call for it at trial.]—2. Where one of the parties to a cause obtains a commission to examine witnesses, the other party has a right to call for it and make use of it at the trial; and *Semble*, that an order for the publication may be obtained before trial. *Gordon v. Fuller*, Trin. Term, 6 & 7 Wm. IV.

Signature and seal of a foreign magistrate to affidavit of execution, genuine without proof.]—3. The signature and seal of the chief magistrate of a town in a foreign country to an affidavit, proving the due execution of a commission to examine witnesses, issued from the Court of Queen's Bench, are to be considered genuine, without further proof. *Doe dem. Lemoine v. Raymond*, Mich. Term, 7 Wm. IV.

Motion for.]—4. A motion for a commission to examine witnesses must be supported by affidavit. *McNair v. Sheldon*, Tay. U. C. R. 623.

[And the affidavit must either specify the names of the witnesses proposed to be examined, or in some other way describe them. *Gunter v. McLearn*, 1 M. & W. 201.]

At what stage of proceedings Court will order.]—5. The Court will not, under the provisions of the provincial statute for issuing commissions to examine witnesses about to leave the province, order such commission before declaration filed. *Saunders v. Playter*, Tay. U. C. R. 40.

Where party may have commission before issue.—6. A party may have a commission to examine a witness before issue joined, upon his undertaking not to act under it until the case is at issue. *Dougal v. Moodie*, i. U. C. R. 257.

Evidence under commission from foreign country.—7. If a witness be examined under a commission in a foreign country, it is not necessary at the trial to prove that he is still without the jurisdiction of the court. *Watson v. Lee*, Hil. Term, 5 Vic.

Execution of—By whom to be certified, the chief magistrate being plaintiff.—8. Where the mayor or chief magistrate of a place to which a commission for the examination of witnesses is sent, is himself the plaintiff, the due taking of the commission may be certified by the person next in rank in the magistracy. *Thompson et al. v. Cummings*, Hil. Term, 4 Vic.

Objections to regularity of, not raised at trial.—9. Where a commission to examine witnesses was put in at the trial, and an objection was taken as to its regularity in the form of the return, the Court would not on argument allow another objection, which would have been fatal if urged at the trial, to be brought up. *Hibbert v. Johnston*, Hil. Term, 6 Vic.

Affidavit of due taking.—10. *Semble*: That an affidavit stating that the commission was duly taken, and not that the evidence was duly taken in accordance with the literal wording of the statute, will nevertheless entitle the commission to be read. *McLeod v. Torrance*, iii. U. C. R. 146.

Intituling of affidavit.—11. *Semble* also, the affidavit need not be intituled in the cause. *Ib.*

12. The affidavit of the due taking of a commission to examine witnesses, though not intituled in the court or in the cause, is nevertheless, when annexed to the commission under the seal of the commissioners and refer-

ring to it, a sufficient affidavit of the due taking of the commission. *Doe dem. Park et al. v. Henderson*, vii. U. C. R. 182.

Return—Affidavit of execution.—13. Where the due taking of evidence given abroad under a commission is sworn to by A. before B., who certifies at the foot of the affidavit that he is "police judge" of a certain town in the State of Kentucky; that A. is a person well known to him, and that he deposed before him to the truth of the matters stated above, and who signs the certificate with a scroll O. in the place of a seal, adding that he has no corporate seal: *Held per Cur.*, upon an objection to the commission, that it could not be read because the affidavit of due execution was not subscribed by the deponent, and because there was no proof of the authority of the person who administered the oath and no seal attached to his name—that the commission was duly executed and might be read. *Passmore v. Harris*, iv. U. C. R. 344.

COMMISSIONERS.

See BOUNDARY LINE COMMISSIONERS. INDIAN LANDS.—MIDLAND DISTRICT TURNPIKE TRUST.—PRINCIPAL AND AGENT, 1.—ST. LAWRENCE CANAL.

COMMITMENT.

See ARREST, IV. 8, 10.—MAGISTRATES, 2, 3, 5, 6.—WARRANT.

COMMON COUNTS.

See ACCOUNT STATED.—ALTERATION.—CASE (ACTION ON THE), 2. DISTRICT COUNCIL, 7.—MASTER AND SERVANT, 4.—MONEY HAD AND RECEIVED.—MONEY PAID.—WORK AND LABOR.

Failure on special counts.—1. A

plaintiff who fails on the special counts of his declaration will not be allowed afterwards to resort to the common counts. *Holden v. McCarthy*, Easter Term, 7 Wm. IV.

Failure in recovery on special agreement.]—2. When a plaintiff fails to recover upon a special agreement still open and executory, and fails from not having made a legal demand upon the defendant to do the work agreed upon, he cannot after such failure, be allowed to recover upon the common counts. *Downs v. Macnamara*, v. U. C. R. 333.

Liability of party on common counts whose name does not appear on a bill.]—3. The party discounting a bill has, in general, no recourse whatever upon the person from whom he has taken the bill, when the latter has not in any way made himself a party to the bill; peculiar circumstances, however, may render a party whose name does not appear on the bill liable to the holder, on the common counts; and it was held that the evidence in this case warranted a recovery against such party upon the common counts for money had and received. *Ross et al. v. Codd*, vii. U. C. R. 64.

COMMON SCHOOLS.

See AMENDMENT, II. 34.—DISTRICT COUNCIL, 15.—DIVISION COURT, 1. PLEADING, I. 4; II. 38; VI. 1.

Agreement by trustees with teacher.]—1. Under the common school act, 7 Vic. ch. 29, the trustees of any school district might make a valid agreement with the teacher of the school for the district, to give him the whole allowance appropriated for such school district for the year when that act came into force, if the teacher served for three months. *Darby v. Earl*, iii. U. C. R. 6.

Parties to sue for a trespass—

Master or trustees.]—2. Under the 44th section of the 7 Vic. ch. 29, the trustees of the school, (and not the school master), should be made the plaintiffs in an action for a trespass to the school house, unless, at least, it can be shewn that the trustees have given the school master a particular interest in the building beyond the mere liberty of occupying it during the day for the purpose of teaching. *Monaghan v. Ferguson et al.* iii. U. C. R. 484.

County superintendent signing a contract with a teacher not a contracting party.]—3. A county superintendent of common schools signing, together with trustees, a contract with a teacher, will be considered to have signed the same only as approving of the appointment, and in pursuance of the direction of the statute, and not as a party contracting with the teacher. *Campbell v. Elliott et al.*, iii. U. C. R. 241.

Breach of agreement to furnish fuel to a teacher—Action—Pleadings—Averment of request, time, and place—Personal liability.]—4. The plaintiff charged the defendants upon a special agreement stated to have been made by them as trustees, to furnish with fuel when required the plaintiff, a school teacher, under the act 9 Vic. ch. 20. To this declaration the defendants demurred upon two grounds: 1st, because no request with time and place had been laid in the declaration to furnish the fuel; 2nd, because the defendants having made the agreement stated in the declaration in their corporate capacity, were not liable as individuals, but had been so charged in the declaration. *Held*, declaration bad upon both grounds. *Anderson v. Vansittart et al.*, v. U. C. R. 335.

School trustees not personally liable on their contract.]—5. School trustees acting under the statute 9 Vic. ch. 20, cannot be sued as individuals upon any contract made by them under the

statute as trustees. *Sheriff v. Patterson et al.*, v. U. C. R. 620.

Action by teacher against trustees—Averment of agreement—Corporate seal.—6. In an action of assumpsit brought by a teacher against the school trustees appointed by the act 9 Vic. ch. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher for one year, from &c., at a certain salary &c.; and also on a special action on the case, founded upon a parol agreement, brought by the teacher under the same statute, for wrongfully, and without cause, turning the plaintiff away, and preventing him thereby from earning his salary: *Held*, that the declaration in both cases was bad in not averring the agreement to have been made with the defendants by their corporate seal. *Quinn v. The School Trustees*, vii. U. C. R. 130.

Teacher—Payment—Mandamus or special action.—7. If the school trustees appointed under the act 9 Vic. ch. 20, decline to sign the order upon the superintendent for the payment of the teacher's money, as provided for by the act, they may be proceeded against by mandamus, or perhaps they may be sued in a special action for not making the order; but they cannot be sued in an action for the money, as that is not in their hands. *Ib.*

Trustees finding board and lodging for teacher.—8. *Semble*: That the school trustees have no power under the act to make an agreement for providing the teacher with board and lodging. *Ib.*

Powers of superintendent.—9. A township superintendent of common schools, appointed under the act 7 Vic. ch. 29, since repealed by the act 9 Vic. ch. 20, sec. 45, has no legal authority to sue the collector of the township for moneys received by him, not in the nature of penalties. *Shirley v. Hope*, iv. U. C. R. 240.

COMPANIES.

See BANK OF BRITISH NORTH AMERICA.—BANK OF UPPER CANADA.—BILLS OF EXCHANGE ETC., II. 8.—BOARD OF WORKS.—BUILDING SOCIETIES.—CANADA COMPANY.—COBOURG HARBOR COMPANY.—CORPORATION, *passim*.—DISTRICT COUNCIL.—GAS COMPANIES.—JOINT STOCK COMPANY.—KINGSTON MARINE RAILWAY COMPANY.—MIDLAND DISTRICT TURNPIKE TRUST.—NIAGARA HARBOR AND DOCK COMPANY.—ORDNANCE DEPARTMENT.—PORT BURWELL HARBOR COMPANY.—PORT CREDIT HARBOR COMPANY.—RIDEAU CANAL.—ST. LAWRENCE CANAL.—TORONTO AND LAKE HURON RAILROAD COMPANY.—WELLAND CANAL.

COMPERUIT AD DIEM.

See BAIL, III. 13.

COMPOSITION.

Evidence to support plea of.—To an action on a note brought by the indorser against the maker, the defendant pleaded that while A. was the holder of the note he compounded by a general agreement with him, (A.) and all his other creditors at 10s. in the £., which composition was afterwards paid to A. in satisfaction of the note and accepted, and that the note was indorsed to the plaintiff after it became due. Issue was taken on the plea by the replication *de injuria*, and the evidence at the trial was not a general agreement of the defendant's creditors to accept a composition of 10s. as pleaded, but merely the fact that the defendant having become insolvent had paid to some of his creditors one rate in the pound, and to other creditors another rate: *Held*, that the evidence did not support the

plea, and that a verdict on the leave reserved should be entered for the plaintiff. *Forster v. Bettes et al.*, v. U. C. R. 599.

COMPUTATION.

I. OF MONIES ON REFERENCE TO THE MASTER.

See ATTORNEY, IV. 4.—BILLS OF EXCHANGE ETC., VIII. 6.—INTEREST, 2.—PRACTICE, II. 8.

II. OF TIME IN DIFFERENT PROCEEDINGS.

See ATTORNEY, III. 1.—NOTICE OF ACTION, 14.—NOTICE OF TRIAL, 5. PRACTICE, I. 15.

CONDITION.

See BOND.

CONDITIONAL LIMITATION.

See ESTATE, 5.

CONDITIONS OF SALE.

See AUCTION, 1, 3, 6.

CONDITIONS PRECEDENT.

See BOND, I. 3, 6.—COVENANT, I. 4. PAYMENT, 7.—PLEADING, II. 16. STAY OF PROCEEDINGS, 2.

CONFESSION AND AVOIDANCE.

See PLEADING, IV.

CONSENT RULE.

See EJECTMENT, IV.

CONSIDERATION.

See AGREEMENT, I. 2.—ASSUMPSIT, I. 12, 13, 14, 15; II. 1.—BILLS OF EXCHANGE ETC., I. 5; VI.—CONTRACT, 2.—CORPORATION, 5.—DEBT, 4.—EJECTMENT, VIII. 15. FRAUDULENT DEED ETC., *passim*. GOODS SOLD, 9.—GUARANTEE, 3, 4.—LEASE, II. 3, 4.—MONEY HAD AND RECEIVED, 6.—ONUS PROBANDI, 7.—PLEADING, II, 42, 43, 44.—STOCK NOTES, 1, 2.—VERDICT, 10. WITNESS, 16.

CONSOLIDATING ACTIONS.

The Court granted a rule for consolidating several actions brought on a bond to a sheriff for the gaol limits. *Leonard v. Meritt*, Dra. Rep. 199.

CONSPIRACY.

See CASE (ACTION ON THE), 8.

CONSTABLE.

Necessity of inserting in the margin of his plea, "by statute."—1. A defendant sued in trespass for false arrest, and intending to urge in his defence that he arrested as a constable, and that the action against him was brought in a wrong county, will not be entitled to do so if he has omitted to insert in the margin of his plea "by statute," unless the Court can say upon the facts proved at the close of the plaintiff's case, that the defendant was acting as a constable. *Brown v. Shea*, v. U. C. R. 141.

Acting without authority in a civil proceeding.—2. *Semble*: That a constable in a civil proceeding has no color or pretence for acting without authority specially given by some process. *Ib.*

3. *Quære*: Is an attachment of privilege within the ninth clause of

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2 Geo. IV. ch. 1? and *Quære*: Would this doubt, or the want of an affidavit being annexed to a bailable process, prevent the defendant, a constable, from having the benefit of the 21 Jac. I., on the point of venue above mentioned? *Ib.*

Duty of, on making arrest.—4. A constable who arrests under a commissioner's writ may refuse to take bail, and if he do take bail, the sheriff may reject them, as the constable's duty under such a writ is only to deliver the defendant to the sheriff; but if the sheriff accept the bail, the bond is good. *Price v. Sullivan et al.*, Hil. Term, 7 Vic.

Arrest by, under commissioner's writ, when legal.—5. An arrest by a constable on mesne process directed to the sheriff, is not legal by the act 2 Geo. IV. ch. 1, sec. 9, unless the affidavit of debt be annexed to the process. *Ross et al. v. Webster*, v. U. C. R. 570.

Duty of constable after arrest on such writ.—6. *Semble*: That a constable may legally allow a debtor whom he has arrested to go at large, so long as he afterwards, and before the return of the writ, deliver him to the sheriff. *Ib.*

CONSUMERS' GAS COMPANY.

See GAS COMPANIES.

CONTEMPT.

See ARBITRATION AND AWARD, VI (1), *passim*.—*ATTACHMENT*, I.; III. 2.—*ESCAPE*, 11, 12, 13, 14, 15.—*LIMITS*, I. 1.—*MAGISTRATES*, 2, 3, 4.—*PARLIAMENT*, 1.—*SHERIFF*, I. 18; II. *passim*.—*SUBPÆNA*, 2, 3.—*WARRANT*, 3, 4.

CONTINGENT REMAINDER.

See ESTATE, 5, 9.

CONTRACT.

CONTINUANCE OF WRITS.

See PROCESS, 5.

CONTINUANCE ROLL.

See EVIDENCE, IV. 1.

CONTRACT.

See AGREEMENT.—*ASSUMPSIT*.—*COMMON SCHOOLS*, 1, 3, 8.—*CORPORATION*, 4, 6, 7, 11.—*DEBT*, 4. *DISTRICT COUNCIL*, 3, 11.—*DISTRICT COURT*, 7, 9.—*EVIDENCE*, I. 4; VIII. 5.—*EXECUTOR ETC.*, I. 11.—*FRAUDS (STATUTE OF)*, I. 2, 3, 4, 5, 6.—*MONEY HAD AND RECEIVED*, 7, 11, 14.—*ORDNANCE DEPARTMENT*.—*SUNDAY*.

Production of, when necessary.—1. Where there was a written contract fixing the price of certain work: *Held*, that in an action to recover compensation for such work, the contract must be produced. *Wallace v. Mason*, Easter Term, 6 Wm. IV.

Joint contract—Statute of Limitations.—2. Where in consideration of the sale of a vessel to A., B. joined with him in an agreement to deliver lumber: *Held*, that this was a joint contract, although B. was only a surety, and that it was not therefore necessary that the consideration should appear on the face of the agreement; and that the promise of A. was sufficient to take the case out of the Statute of Limitations as against B. *Thompson et al. v. Cummings*, Mich. Term, 4 Vic.

Misrepresentation.—3. *Quære*: Can a misrepresentation avoid a contract, without its being fraudulently made? *Lacey v. Spencer*, iii. U. C. R. 169.

Evidence—Joint contractors.—4. The plaintiff proceeding upon a note against several defendants as joint con-

tractors, chargeable on the same contract and in the same capacity, must prove a case against all of them. *Sifton v. McCabe et al.*, v. U. C. R. 394.

Deviation—Implied approval.]—5. Where the defendant had ordered the plaintiffs to make for him some iron castings of a specified thickness for a shop front, and the plaintiffs made them much thicker than the order; but the defendant, notwithstanding, allowed them to be put up in the building for which they had been made, without objection; the plaintiffs, at Nisi Prius, obtained a verdict for their full value—the Court refused to grant a new trial. *Good et al. v. Harper*, iii. U. C. R. 67.

Construction of contract—Deviation.]—6. The defendants are taken by the plaintiff to a quantity of timber already made upon the ground; having seen the timber they contract with the plaintiff to draw it out, and well and truly to deliver it to the plaintiff on a bank of a river: *Held*, that the timber cut in two by the defendants to suit their convenience, and without the permission of the plaintiff, and drawn out to the river in that *altered state*, was not a delivery within the meaning of the contract. *Reynolds v. Shuter et al.*, iii. U. C. R. 377.

Sale of lands—Deceit—Statute of Frauds.]—7. Before the defendant can be charged with deceit in a contract, he must be shewn to have entered into a contract such as is required by the Statute of Frauds, and to have clearly practised or intended the deceit alleged against him. *Irving v. Merygold*, iii. U. C. R. 272.

Extra work.]—8. *Quære*: As to what is *extra work* under a contract, and *extra work* beside a contract? *Ritchey v. The Bank of Montreal*, iv. U. C. R. 459.

9. *Held*, that under the agreement and facts proved, (as given in the report), the extra work claimed for by

the plaintiff, must be considered not extra work done under the contract as part of the original undertaking, but as work done under a subsequent new agreement, wholly deviating from the former contract, and which could not be, in any sense, regarded as work done upon the terms of the original contract, either as to time or mode of payment; and that the plaintiff might recover for such work under the account stated. *Watson v. O'Beirne*, vii. U. C. R. 345.

Construction of contract as to liability of parties.]—10. A. contracts with a company to make a highway—B. becomes security to the company for the fulfilment of A.'s contract.—A. then employs C. to cut out certain timber for him, at a stipulated price.—A., while C. is engaged in cutting out the timber, fails in his contract with the company.—B., the surety, upon A.'s failure, tells C. to go on with his work and he will see him paid.—Upon completing his work, C. sues A. and B. jointly: *Held*, that under these facts there was no joint contract by A. and B. with C., but that A. was primarily liable on his contract, and B. secondarily liable as a guarantee. *Nichols v. King et al.*, v. U. C. R. 324.

Whether a party contracting is liable personally, or as representing a company.]—11. The plaintiff sued the defendant for lumber furnished on the occasion of the Provincial Agricultural Society's meeting at Hamilton.—The defence was, that the Society, which was an incorporated body, was liable, and not the defendant personally. The learned judge at the trial left it to the jury to find upon the evidence whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend—in either of which events, he held him to be personally liable; but the jury were told, that if he contracted only as representing, or on behalf of the corporation, that then he would not be personally liable:

Held, on motion for a new trial, the verdict being for the plaintiff, that the ruling of the learned judge at the trial was correct. *Simpson v. Carr*, v. U. C. R. 326.

Contract for work at a fixed sum—Subsequent agreement to take note therefor.—12. Where a plaintiff contracts to receive for work done, at its completion, a certain sum of money, and then agrees to accept from the defendant the promissory note of B. for the sum, if the note be not delivered he may sue for the money. *Fisher v. Ferris*, vi. U. C. R. 534.

Tender of note.—13. If the note be not tendered at the time specified, a subsequent tender of the note and refusal will be no defence to such an action. *Ib.*

Lumber trade—Liability of parties.—14. A. was cutting timber on B.'s land.—B. refused to allow him to cut it, unless C., the party who was to get the timber when cut, should become answerable to A. for it.—C. agreed to become so, and A. was permitted by B. to take away the timber. It was further agreed between B. and C., that upon the timber being passed at Bytown free from duties to the government—that is, passed as private timber—B. should be paid by C. the price the government would have paid for it had it been crown timber: *Held*, that upon this verbal agreement, B. could sue C. upon the common count for goods sold and delivered, when the time arrived for passing the timber through Bytown. *And also*, that upon a sale of the timber at Quebec, C. might be liable to B. on the common count for money had and received. *McNab v. McGill*, vi. U. C. R. 142.

CONTRIBUTION.

Assumpsit—Remedy of one of several defendants, who has paid the whole debt.—1. One of several de-

fendants, in assumpsit, who has paid the whole amount of the damages under an execution, is entitled to recover contribution from the other defendants; and in an action for such contribution, the regularity of the judgment in the original action cannot be questioned; and it is not necessary to shew any notice of execution, nor demand of the money, before action brought. *Woodruff v. Glassford*, iv. O. S. 155.

Award against two—Remedy of the one paying the whole.—2. When an award directs two parties to pay each a certain sum of money to a builder, and one is obliged to pay the whole from a refusal by the other to pay his share, the party so paying can compel contribution by suing the other in covenant for non-performance of the award. *Allen v. Coy*, vii. U. C. R. 419.

CONVICTION.

See APPEAL, 1.—INDIAN LANDS, 1:—MAGISTRATES, 13.—WARRANT.

For selling spirituous liquors without license.—1. A conviction under 40 Geo. III. chapter 4, for selling spirituous liquors without license, was quashed, because the information stated that "the defendant was in the habit of selling spirituous liquors without license," without charging any special offence, and not shewing time or place, nor that the liquors were sold by retail; and also, because the conviction directed the defendant to pay the costs of the execution, without specifying the amount. *Rex v. Ferguson*, iii. O. S. 220.

When a defence to an action of trespass.—2. A conviction, bad upon the face of it, although not quashed: *Held*, not to be a sufficient defence to an action of trespass. *Briggs v. Spilsbury*, Tay. U. C. R. 608.

[See *Eastman v. Reid*, 8, *infra*.]

Amendment.—3. A conviction, substantially defective, cannot be amended. *Regina v. Ross*, Hil. Term, 3 Vic.

Under by-law.—4. A conviction, under a by-law must shew the by-law, that the Court may judge of its sufficiency. *Ib.*, Mich. Term, 3 Vic.

Conviction for unlawfully receiving tolls—Informalities.—5. The following conviction before magistrates, "for that the defendant did, 'at, &c., on or about the first day of December, and upon other days and times before and since, take and receive toll from the informant, at toll gate No. 3, situate on the macadamized road between Hamilton and Brantford, in said district, unlawfully and improperly, the said gate not being in a situation or locality authorized by law," being moved into the Court of Queen's Bench by certiorari, was held bad, in not shewing that the defendant was summoned or was heard, and in not setting out the evidence, or stating that any complaint was made, or evidence given by any one on oath, in not stating how much toll was taken, and in not shewing in what respect the taking of toll was unlawful. *Regina v. Brown*, iv. U. C. R. 147.

[See case 9, *infra*.]

For selling spirituous liquors by retail, without license.—6. Held, that the following conviction for selling spirituous liquors by retail, contrary to the law, "that A. of, &c., merchant and shop-keeper, did, within the space of six calendar months now last past, in the year aforesaid at, &c., vend and sell a certain quantity of spirituous liquors in less quantity than one quart, to wit, one pint, &c., without license for that purpose previously obtained, contrary to the form of the statute in such case made and provided," was bad in substance, in leaving it doubtful under which of the statutes (40 Geo. III. ch. 4, 4 Wm. IV. ch. 18, 4 Geo. IV. ch. 19), and for what offence the

conviction was made. *Wilson v. Graybiel et al.*, v. U. C. R. 227.

If first defective, justices may file a second.—7. *Semble*: That after the first conviction has been returned to the Quarter Sessions and filed, the justice, if he think it defective, may file a second. *Ib.*

Magistrates justifying, must justify under a legal conviction, &c.—

8. A magistrate, in order to have a good justification under a conviction and warrant, must give in evidence a conviction not illegal on the face of it, and a warrant of distress supported by that conviction, and not on the face of it an illegal warrant: *Held*, therefore, that a magistrate's conviction, "for wilfully damaging, spoiling and carrying away six bushels of apples of the the said Rogers," did not support a warrant which recited "that whereas judgment was given against Jonathan Eastman, of, &c., in a suit, *Rogers v. Eastman*, for a *misdemeanor*, in taking apples by force and violence off and from the premises of the said Rogers, &c.; these are therefore to authorise, &c.;" and also, that neither the conviction nor the warrant contained a statement for an offence for which such a conviction could take place. *Eastman v. Reid*, vi. U. C. R. 611.

Omissions which render a conviction bad.—9. *Held*, that a conviction was bad in omitting—1st, any statement of the information; 2ndly, the summons and appearance, or default of the accused; 3rdly, his plea, denying or confessing; 4thly, the evidence. *Also*, in not shewing that any toll was claimed, or what toll, or how imposed, by reason of the completion of the road or any part of it. *Also*, because it did not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and after turning out of the road had returned to or re-entered it with such carriage or animal beyond a

toll-gate without paying toll, whereby payment was evaded.—*Regina v. Haystead*, vii. U. C. R. 9.

CO-PARCENERS.

See ACCOUNT (ACTION OF), 3.

CORNWALL CANAL.

See ARBITRATION & AWARD, IV(3), 7.

CORONER.

See JURY, 10.

Poundage.]—A coroner is not entitled to poundage on an attachment against a sheriff. *Duggan, In re*, ii. U. C. R. 118.

CORPORATION.

See BANK OF BRITISH NORTH AMERICA.—BANK OF UPPER CANADA. BUILDING SOCIETIES.—CANADA COMPANY.—COSTS, I(1), 18.—DISTRICT COUNCIL.—DISTRINGAS. EJECTMENT, IV(2), 6.—GAS COMPANIES.—KING'S COLLEGE.—MANDAMUS, 5, 13.—NIAGARA HARBOR AND DOCK COMPANY.—ORDNANCE DEPARTMENT.—RELIGIOUS SOCIETIES, 3.—TORONTO (CITY OF).

Right of stockholder to inspect the stock books of a bank.]—1. A stockholder is not entitled, as a matter of right, to inspect the stock book or other books of a bank. *Bank of Upper Canada, In re*, Dra. Rep. 57.

Action by corporation—Breach in private capacity—Non pros.]—2. The declaration at the suit of a corporation named the individuals composing it, and also described them in their corporate capacities. The breach was in their names, as individuals only.—

The Court held that a non pros. might be signed and execution issue against them in their private capacities. *Markland et al. v. Dalton*, Tay. U. C. R. 156.

Right of foreign corporation to maintain an action on notes here.]—

3. A foreign corporation, such as a bank, cannot maintain an action upon promissory notes received and discounted by them in the course of banking business in this province, although they may maintain an action for money had and received to their use, against the person for whom such notes were discounted and to whom money was advanced upon them. *Bank of Montreal v. Bethune*, Hil. Term, 6 Wm. IV.

Assumpsit against.]—4. Where a corporation had entered into a contract under seal with the plaintiff for the performance of certain work, which was afterwards departed from by their orders with the consent of the plaintiff: *Held*, that assumpsit would lie for the value of the work done under the substituted contract. *Davis v. Grand River Navigation Company*, Mich. Term. 2 Vic.

Assumpsit by, on an executory consideration.]—5. A corporation may maintain assumpsit on an executory as well as on an executed consideration, where the contract is in the usual course of business. *Kingston Marine Railway Company v. Phillips*, Mich. Term, 3 Vic.

Agreement with—Departure on their part—Action against.]—6. Where the plaintiff made an agreement with a Harbor Company for the admission into their harbor of certain property of the plaintiff's, for a fixed sum, less than the amount of toll to which they might have been entitled under their charter, but they afterwards refused to allow the property to be removed without the payment of their usual harbor dues: *Held*, that the plaintiff might maintain an action for

money had and received to recover back the overplus. *March v. Port Hope Harbor Company*, Hil. Term, 4 Vic.

Contract not under seal.]—7. *Semble*, that a municipal corporation may contract to hire a clerk or servant to render service in the ordinary business of the corporation, without using their corporate seal, and such servant may sue on the contract: *Raines v. The Credit Harbor Company*, i. U. C. R. 174.

Weigh-master of the City of Toronto—recovery of salary upon wrongful dismissal.]—8. The plaintiff had been appointed many years ago, by the corporation of the city of Toronto, weigh-master and clerk of the fish-market. He had been voted each year by the common council a sum of money for his services during the then current year. The municipal year began on the 23rd of January. For the year 1847, the plaintiff had been voted 90% for his salary. On the 30th June 1848, the corporation having determined to farm out the plaintiff's office, he was dismissed without notice, and without any allowance being made for his services between January and June of 1848. The plaintiff brought an action of assumpsit against the corporation to recover a year's salary at the same rate as had been voted him the previous year. The corporation resisted the action upon the general grounds: 1st, that assumpsit for services rendered as upon an executed contract not under the corporate seal, would not lie. 2ndly, that the plaintiff held his office at sufferance, both as respected tenure and allowance. 3dly, that before action brought, the corporation should have been requested to vote an allowance; but *Held*, that assumpsit would well lie; and that though the plaintiff, holding his office during pleasure, by the act of incorporation, could not recover the whole year's salary for 1848, still he was

entitled to his salary for 1848 to the time of his dismissal, at the rate of salary voted to him for 1847, and that no previous demand upon the corporation to vote an allowance need be proved. *Dempsey v. The City of Toronto*, vi. U. C. R. 1.

When Court prevented from noticing want of legal authority for suing in corporate capacity.]—9. Where the defendant pleads over and takes no exception to the declaration, the Court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity. *Bank of British North America v. Sherwood*, vi. U. C. R. 213.

Proof of seal.]—10. Where a witness stated that he had good opportunity, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself and from seeing the signature of the party whose handwriting was attached to it, with whose handwriting he was acquainted: *Held*, that this evidence, though not conclusive, was sufficient to go to a jury to authenticate the seal. *Doe dem. King's College v. Kennedy*, v. U. C. R. 577.

[See FOREIGN JUDGMENT, 2.]

11. When a corporation must contract under seal. See *Blue v. Gas and Water Company*, vi. U. C. R. 147.

COSTS.

See ARBITRATION AND AWARD, VII. EJECTMENT, IV(2); VI.—SECURITY FOR COSTS.

I. FULL COSTS.

- (1), *When allowed.*
- (2), *When not allowed.*
- (3), *Certificate.*

II. COSTS OF THE DAY.

III. SEVERAL ISSUES.

- IV. UNDER 49 GEO. III. CH. 4.
 - (1), *Section I. (Arrests.)*
 - (2), *Section II. (Judgments.)*
- V. UNDER 7 WM. IV. CH. 3, SECS. 24 AND 26. (*Demurrers.*)
- VI. UNDER 5 WM. IV. CH. 1. (*Promissory notes.*)
- VII. UNDER OTHER STATUTES.
- VIII. OTHER MATTERS RELATING TO COSTS.

I. FULL COSTS.

(1), *When allowed.*

See DISTRICT COURT, 3.—PLEADING, VIII. 7.

Plaintiff and defendant and plaintiff's witnesses, resident in different districts.]—1. Where the plaintiff and defendant, and the plaintiff's witnesses, resided in different districts, full costs were allowed on a cause of action within the jurisdiction of the district courts. *Hugill v. Driscoll*, Dra. Rep. 246.

[See cases 10, 12 and 16, *infra.*]

Promissory note originally beyond jurisdiction of district courts.]—2. Where the amount of a promissory note originally beyond the jurisdiction of the district courts had been reduced within it by payments *after* action brought, the plaintiff was allowed full costs. *Kilborn v. Wallace*, iii. O. S. 17.

[See div. II(2), 4, *infra.*]

Account originally beyond jurisdiction of district courts.]—3. Where the amount of an account originally beyond the jurisdiction of the district courts, was reduced to an amount within the jurisdiction of the court of requests by payments *before* action brought, a suggestion to deprive the plaintiff of full costs under the Court of Requests Act, was refused. *Scott v. Ferguson* and *Scott v. Rooke*, Mich. Term, 3 Vic.

[See case 17, *infra.*]

Plaintiff being judge of district

court.]—4. Where one of the plaintiffs was judge of the district court of the district in which the defendant resided, full costs were allowed, although the cause of action was within the district court jurisdiction. *Jones et al. v. Wing*, iii. O. S. 36.

[See cases 13 and 14, *infra.*]

Award within district court jurisdiction.]—5. Where an action is commenced in the King's Bench, and arbitrators upon reference award damages under the jurisdiction of the district courts, the plaintiff is not deprived of costs under the District Court Act. *Lang v. Hall*, Tay. U. C. R. 286.

6. Where a cause is referred to arbitration by order of Nisi Prius, and the arbitrators award a sum within the jurisdiction of the district courts—the Court or a judge may grant an order for full costs under the ninth general rule of Easter Term, 11 Geo. IV. *Elmore v. Colman*, Mich. Term, 6 Wm. IV.

[See case 19, *infra.*]

Action by attorney.]—7. Where a plaintiff, an attorney, brought assumpsit and proved a cause of action to 20*l.*, he was allowed full costs, although the jury rejected all his claim but three shillings. *King v. Such*, Hil. Term, 6 Wm. IV.

[See div. II(2), 10, *infra.*]

Breach of promise of marriage.]—8. In an action for breach of promise of marriage, one shilling damages will carry full costs. *Jeffery v. Lawrence*, Mich. Term, 7 Wm. IV.

*Slander, 1*s.* damages.]—9.* Where the jury found for the plaintiff in an action of slander one shilling damages and full costs of suit, full costs were allowed. *Skinner v. Nevin*, Mich. Term, 7 Wm. IV.

Several defendants in different districts.]—10. Full costs were allowed in a cause within the jurisdiction of the district courts, where there were several defendants residing in different

districts. *Jones et al. v. O'Sullivan et al.*, Hil. Term, 3 Vic.

Assessment of sum under district court jurisdiction.—11. The Court ordered full costs on an assessment of damages upon a cause of action exceeding 30*l.*, but under district court jurisdiction, it being a case in which the Court would have granted a certificate if there had been a trial. *Ferrie et al. v. Young*, iii. O. S. 140.

[See *McGill v. Stull*, division (2), case 2, *infra.*]

Note. Defendant residing in district other than that in which note made.—12. Full costs were allowed on a promissory note for 10*l.*, the defendant having left the district in which the note was made and was residing in another. *Perrin et al. v. Carson*, Trin. Term, 2 & 3 Vic.

[See div. (2), 3, *infra.*]

No judge in district where cause of action arose.—13. Full costs were allowed in a *bailable* action, within the jurisdiction of the district courts, there being no judge in the district where the cause of action arose, when the action was brought. *Jennings v. Dingman*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

14. Full costs were allowed, under circumstances similar to those in the last case, in a non-bailable action. *Willis v. Merriton*, Trin. Term, 4 & 5 Vic., P. C., Macaulay, J.

Trespass for assault and battery.—15. Where in trespass for assault and battery, the defendant pleaded that the plaintiff was wrongfully in the defendant's close, and molliter manus imposuit to turn him out, and the plaintiff replied excess, and obtained a verdict for one shilling: *Held*, that he was entitled to full costs. *Caniff v. Corwin*, Trin. Term, 5 & 6 Vic., P. C., Macaulay, J.

Defendants resident in different districts.—16. Full costs were allowed in a joint action against the maker and indorser of a promissory note, for

less than 40*l.*, under 5 Wm. IV. ch. 1, where the defendants resided and were served with process in different districts. *Bank of British North America v. Denison et al.*, i. U. C. R. 414, P. C., Macaulay, J.

Balance of account originally beyond district court jurisdiction.—17. The plaintiff is entitled to tax full costs, when he sues to recover the balance of an account originally beyond the jurisdiction of the district courts, but which is reduced to a sum apparently within it by payments made by the defendant, which have never been specially applied to any items in the account. *Mearns v. Gilbertson*, Mich. Term, 7 Vic.

On the ground of doubts as to the right of suing a corporation in district court.—18. The plaintiffs sue a corporation in debt, and recover only 5*l.*—The plaintiffs move the court in banc. to be allowed Queen's Bench costs, on the ground that it was impossible for them to proceed against the defendants in a district court—the Court ordered Queen's Bench costs in this suit to be taxed for the plaintiffs, as it was the first time such question had been raised, but they intimated an opinion that a corporation could be sued in a district court, and that upon the point again coming before the Court, they would grant a rule nisi, and have the matter formally argued. *Fisher et al. v. The City of Kingston*, iv. U. C. R. 213.

Award under Court of Requests Act.—19. Where a verdict was taken subject to a reference, and the arbitrators awarded 10*l.*, reducing only the price and not the items of the account, for the recovery of which the action was brought—a suggestion to deprive the plaintiff of costs, under the Court of Requests Act, was refused. *Stratford v. Sherwood*, Trin. Term, 6 & 7 Wm. IV.

Quare clausum fregit—One shilling damages.—20. Where to an

action *quare clausum fregit*, the defendant pleaded "that the close was not the close of the plaintiff," and the plaintiff had a verdict for one shilling damages: *Held*, that the plaintiff, under the statute 22 Car. I. ch. 9, though he had not obtained from the judge at the trial a certificate that the title of the land came in question, was nevertheless entitled to full costs. *Lake v. Briley*, v. U. C. R. 307.

Promissory note for 25l. made at Perth, discounted at Brockville.]—21. A note of 25l. was made and indorsed at Perth, in the Bathurst District, but was discounted at Brockville, in the Johnstown District, by the agent of the plaintiffs, the indorsees.—The plaintiffs sued the defendants (the maker and indorser) in the Queen's Bench, laying the venue in the Johnstown District.—Judgment by default and an order to compute was obtained: *Held*, that under these circumstances, the plaintiffs were entitled to Queen's Bench costs. *Commercial Bank v. Kerr et al.*, v U. C. R. 320.

Taxation.]—22. The Master is not to refuse to tax Queen's Bench costs, merely because the verdict is within the district court jurisdiction, although the judge who tried the cause has not certified. *McMurray v. Orr*, Dra. Rep. 3.

(2), *When not allowed.*

See DISTRICT COURT, 3.

Covenant—Verdict 2l.]—1. The plaintiff was not allowed full costs, where in an action of covenant he recovered only 2l., and the judge did not certify. *Gardner v. Stoddard*, Dra. Rep. 101.

Recovery by default of sum within jurisdiction of district courts.]—2. The plaintiff is not entitled to full costs as a matter of right, where he recovers after a judgment by default an amount apparently within the jurisdiction of a district court, as the ninth rule of

Court of Easter Term, 11 Geo. IV., in such case requires the order of the Court, or of a judge, for such taxation. *McGill v. Stull*, iii. O. S. 140.

Plaintiff's residence when action accrued—Removal of defendant to another district before action.]—3. Full costs will not be allowed on a cause of action within the jurisdiction of the district courts, unless the cause of action arose in the district in which the plaintiff resides, or the defendant removed from the district in which the action accrued before action brought. *Ketchum v. Chrysler*, Hil. Term, 7 Wm. IV.

Promissory note originally beyond jurisdiction of district courts.]—4. Where the amount of a promissory note originally beyond the jurisdiction of the district courts had been reduced within it by payments before action brought, full costs were refused. *Donnelly v. Gibson*, Hil. Term, 2 Vic.

Application for full costs not fully met.]—5. Where an application is not fully met, although sufficient be shewn for the discharge of the rule, costs will be refused. *Harvey v. Kay*, Easter Term, 2 Vic.

Plaintiff resident in United States.—6. Full costs were refused on a promissory note under 40l. where the plaintiff resided in the United States. *Sawyer v. McDonell*, Trin. Term, 7 Wm. IV.

General verdict within district court jurisdiction.]—7. Where the plaintiff, on a declaration containing a special count and the common counts, recovered a general verdict for a sum within the jurisdiction of the district courts, and did not obtain any certificate for Queen's Bench costs: *Held*, that he was entitled only to district court costs. *Washburn v. Langley*, Mich. Term, 5 Vic.

Covenant—Verdict under 40l.]—8. Where in covenant the plaintiff assigned two breaches—one for liqui-

dated, and the other for unliquidated demand, and recovered a verdict under 40*l.*: *Held*, that he was not entitled to Queen's Bench costs without a certificate. *Beattie et al. v. Cook*, Mich. Term, 5 Vic.

Promissory note—Disputed consideration as a reason for suing in Queen's Bench.—9. The plaintiff, residing in the London district, sold goods to the defendant, who resided in the Western district, and the defendant then gave his note for the amount: *Held*, that on the mere surmise that the consideration of the note might be disputed, the plaintiff was not justified in suing in the Queen's Bench, but should have sued in the Western District Court, and could not therefore get full costs. *Cronyn v. Probat*, Mich. Term, 5 Vic.

Suit by attornies for costs.—10. Where the plaintiffs, suing as attorneys for the amount of a bill of costs, proceeded by an attorney and not in person by attachment of privilege, and assessed damages at a sum under 10*l.*, the Court refused to allow them full costs. *Strachan et al. v. Bullock*, ii. U. C. R. 382.

(3), Certificate.

Motion, when to be made.—1. A certificate for full costs on a verdict which is for an amount within the jurisdiction of the district courts, must be moved for immediately after the trial. *Falls et al. v. Lewis*, Easter Term, 1 Wm. IV., and *Patton v. Williams*, Hil. Term, 3 Vic.

2. A certificate for costs, either under the Division Court Act or under the District Court Act, must be moved for *immediately after the verdict is rendered*, and if not moved for then, or moved for and refused, no discretion remains with the Court or with the judge who tried the cause to grant a certificate for costs afterwards: *Semble*, that if a plaintiff think he is entitled to Queen's Bench costs upon the face

of the record, without the aid of a certificate, his course is to proceed to tax his costs in the first instance, and if the Master will not allow him full costs, to apply for a revision of taxation. *Malloch v. Johnston*, iv. U.C.R. 352.

3. The motion for a certificate for Queen's Bench costs under the provincial statute 58 Geo. III. ch. 4, if not made until after other causes have been tried, though upon the same day, will not be granted. *McKee v. Irwine*, i. U. C. R. 160.

4. Where there are issues in law and in fact, and a venire as well to try the issues as assess the damages, and a verdict is rendered for the plaintiff for an amount within the jurisdiction of the district courts, a certificate for costs must be applied for at the trial, and an order cannot be made by a judge for the taxation of such costs, as in cases of assessment, after judgment by default. *Mahoney v. Zwick*, vi. O. S. 99.

May be drawn up at any time.—6. If a judge at Nisi Prius order a certificate for full costs on a verdict apparently within the jurisdiction of the district courts, it may be drawn up at any time. *Linfoot v. O'Neill*, Mich. Term, 7 Wm. IV.

Grounds for.—7. Where the plaintiff's claim is within the jurisdiction of the district courts, it is no ground for a certificate for full costs that the defendant's set-off could not be tried in the district court. *Gooderham v. Chilver*, Easter Term, 7 Wm. IV.

Setting aside judge's order.—8. Where a verdict was found for the plaintiff for a sum within the jurisdiction of the district courts in a defended cause, and the judge at Nisi Prius did not grant a certificate for Queen's Bench costs, but the plaintiff afterwards obtained an order for costs in chambers from another judge, as if the damages had been assessed after

judgment by default—the Court set the order aside. *McNab v. Reeves*, Hil. Term, 6 Vic., P. C., McLean, J.

Examination of a witness after verdict, with a view of granting certificate.—9. Where on the trial of an issue in assumpsit, and after the jury had rendered their verdict, but before any other business was proceeded with, the learned judge examined a witness to prove only that the cause was one proper to be tried in the Queen's Bench, and thereupon granted a certificate for costs—the Court, on motion to rescind the certificate, held that it was properly granted. *Handcock v. Bethune*, ii. U. C. R. 386.

II. COSTS OF THE DAY.

See INFORMATION, 9.—JUDGMENT AS IN CASE OF NON-SUIT, I. 14; IV. 3, et seq.

Rule.—1. The rule for costs of the day for not proceeding to trial is absolute in the first instance. *Chisholm v. Simpson*, Dra. Rep. 2.

Defendant accepting short notice of trial—Plaintiff does not proceed pursuant thereto.—2. Costs of the day were allowed to a defendant who, by agreement with the plaintiff, accepted short notice of trial, and the plaintiff did not proceed to trial pursuant thereto. *Harris v. Hawkins*, iii. O. S. 142.

Defendant not going to trial according to agreement.—3. Where the plaintiff having given notice of trial, did not enter his record with the clerk of assize in time, but the defendant, notwithstanding, agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go to trial, he was refused the costs of the day. *Crawford v. Cobbledike*, Mich. Term, 5 Wm. IV.

Will not be ordered to be paid to defendant's executors.—4. The Court refused to order a plaintiff to pay to

the defendant's executors the costs of not going to trial pursuant to notice. *Morris v. Randall*, Tay. U. C. R. 409.

[See liability of executors themselves for costs—EXECUTOR ETC., I. 9.]

Record entered by consent, no notice being given.—5. Where no notice of trial had been given, but the cause was entered after the commission day by consent, and the plaintiff did not afterwards proceed to trial: *Held*, that the defendant was entitled to costs of the day. *Doe dem. Tenbroek v. Cole*, Hil. Term, 5 Vic., P. C. McLean, J.

Cause put to foot of docket by consent, and not afterwards tried.—6. Where a cause not ready in its turn was put to the foot of the docket with the consent of the defendant, and was not tried afterwards—costs of the day were refused. *Bank of Upper Canada v. Covert et al.*, Mich. Term, 6 Wm. IV.

Notice of countermand not served in time.—7. Where the plaintiff's attorney sent notice of countermand of trial to his agent in town, but it arrived too late for service, and the plaintiff's witnesses attended for the trial: *Held*, that the expenses of such witnesses were rightly allowed in the costs of the day. *Spafford v. Buchannan*, Mich. Term, 6 Wm. IV.

Cause not entered for trial on commission day of the assizes.—8. The defendant is entitled to costs of the day where the plaintiff does not enter his cause for trial on the commission day of the assizes, although he offers to enter it subsequently, which the defendant refuses to allow. *O'Neill v. Barnhart*, Hil. Term, 7 Wm. IV.

When new notice necessary.—9. Costs of the day were refused, where after notice of trial given the defendant obtained leave to withdraw his plea, and pleaded de novo, and the plaintiff did not proceed to trial—the Court considering a new notice neces-

ary. *McMillan v. Fergusson*, Mich. Term, 2 Vic.

On notice of assessment.]—10. When a plaintiff gives notice of assessment of damages after judgment by default, and does not countermand his notice nor proceed to assess his damages, the defendant is entitled to costs of the day. *The King's College v. Maybee*, ii. U. C. R. 94.

[Also, 13 *infra*.]

Defect in jurata—Jury discharged.]—11. Where after the jury were sworn in an ejectment cause, the defendant objected that the jurata was defective, and the judge being of that opinion, discharged the jury, and the defendant obtained a rule for the costs of the day—the Court afterwards rescinded the rule, on motion of the lessors. *Doe dem. Crooks et ux. v. Cummings*, ii. U. C. R. 380.

Special jury.]—12. The costs of a special jury are costs in the cause, and not costs of the day. *Whitehead v. Brown*, ii. O. S. 343.

[Also, see JURY, 5.]

Not proceeding to assessment according to notice.]—13. The Court allowed costs for not proceeding to assessment of damages pursuant to notice. *Cross et al. v. Cronther*, Tay. U. C. R. 243.

III. SEVERAL ISSUES.

Issues in fact and in law—Some found for plaintiff, and others for defendant.]—1. Where there are issues in fact and in law, and the issues in fact, and one issue in law are in favor of the plaintiff, and an issue in law in bar of the action in favor of the defendant, the plaintiff is entitled to the costs of the trial and of the pleading determined in his favor, and the defendant to the general costs of the cause. *Davis v. Davis*, Hil. Term, 7 Wm. IV.

Issues in law for plaintiff, in fact for defendant.]—2. Where the defen-

dant took issue upon some of the counts in the plaintiff's declaration, and demurred to the rest, and judgment was against the demurrer, but the issues were found for him: *Held*, that he was entitled to the costs of those issues. *Sheldon v. Hamilton*, Mich. Term, 3 Vic.

3. The defendant demurs to one of the counts in a declaration, and takes issue on the others; the plaintiff goes to trial and assesses contingent damages on the demurrer to one farthing; the plaintiff succeeds upon the demurrer and the defendant has a verdict upon all the issues: *Held*, that the defendant is entitled to his costs of the issues in fact, and may have judgment and execution for them. *Taylor v. Carr*, iv. U. C. R. 149.

Verdict on one plea for plaintiff, on another for defendant.]—4. The plaintiff sues in trespass in one count, for breaking and entering his house and taking away goods. The defendant justifies the breaking and entering in one plea, and in another, he denies the goods to be the plaintiff's. The defendant has a verdict upon the first plea, and the plaintiff upon the second for 30s. *Held*, that the plaintiff was entitled to judgment in the action and the costs of the cause. *Evans v. Kingsmill*, iv. U. C. R. 132.

Issues in law for defendant, in fact for plaintiff—Amendment by plaintiff.]—5. When upon a demurrer and issues in fact, judgment is given in favor of the defendant on the demurrer, and the issues in fact are found for the plaintiff, the defendant cannot call upon the plaintiff to pay him the costs of the trial of the issues on which he failed as a condition of his (the plaintiff's) being allowed to amend on the demurrer. *Bank of British North America v. Ainley*, vii. U. C. R. 521.

IV. UNDER 49 GEO. III. CH. 4.

(1), Section I. (*arrests*.)

Construction of statute.]—1. *Sem-ble*: The words of the statute “being arrested and held to special bail,” are satisfied by the defendant being arrested and imprisoned. *M’Gregor v. Scott*, Tay. U. C. R. 66.

Verdict for less than sum sworn to.]—2. The plaintiff is allowed no costs where in a bailable action he recovers less than the sum sworn to, and the Court will order the defendant his costs; and the defendant is entitled to set off his costs against the plaintiff’s verdict. *Burrows v. Lee*, Easter Term, 3 Vic.

Award for less than sum sworn to.]—3. Where the plaintiff had arrested the defendant for a considerable sum of money, and evidence had been given in Court of a larger sum being due to the plaintiff, and the case was then referred with other matters to arbitration, and the arbitrators awarded the possession of a mill to the plaintiff and 6*l.* or 7*l.* only in money, the Court refused to give costs to the defendant under the provincial statute for preventing vexatious arrests. *M’Gregor v. Scott*, Tay. U. C. R. 66.

*Arrest for 30*l.* without allowing for set-off—Award.*]—4. Where the plaintiff arrested the defendant for upwards of 30*l.* without making any allowance for a set-off, of which he must have been aware, and a verdict was taken for the plaintiff for the whole amount subject to a reference, and the arbitrators allowed the set-off and awarded the plaintiff only 20*l.*, the defendant was held to be entitled to costs. *Kendrew v. Allen*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

Award for less than sum sworn to.]—5. Where in a bailable action a verdict has been taken subject to a reference to arbitration, and the arbitrators award a less sum than the amount for which the defendant was arrested, the defendant may be allowed his costs; although, *semble*, not if the rule of reference direct that the

costs shall abide the event. In this case, in which the circumstances were nearly similar to those in the last case, the Court refused to allow the defendant his costs. *Nicholson v. Allen*, Mich. Term, 5 Vic.

6. Where the plaintiff arrested the defendant for 20*l.* and a verdict was afterwards taken by the plaintiff by consent for 50*l.*, subject to a reference to arbitration, and the arbitrators awarded 11*s.* 3*d.* to the plaintiff, and it appeared by the affidavit of the arbitrators that the plaintiff shewed a cause of action to no greater an amount, the Court made a rule absolute to allow the defendant his costs. *McMicking v. Spencer*, Hil. Term, 6 Vic., P. C. McLean, J.

Rule for costs incorrectly intituled.]—7. Where a rule nisi to deprive the plaintiff of costs under 49 Geo. III. ch. 4, was not correctly intituled, the Court allowed an amendment by the affidavits filed on payment of costs. *Ball v. McKenzie*, Trin. Term, 7 Vic. P. C. Macaulay, J.

Affidavit.]—8 To ground an application for costs upon a malicious arrest, the affidavit must state that the defendant was arrested without reasonable or probable cause. *McIntosh v. White*, Tay. U. C. R. 67.

Insufficient affidavits.]—9. Where the defendant applied for costs under the act above mentioned, the rule was refused, because it nowhere appeared in the affidavits for what sum the plaintiff had recovered a verdict. *Powell v. Gott*, i. U. C. R. 415.

[See also 11, *infra*.]

Cause referred to arbitration, no verdict being taken.]—10. Where a cause has been referred to arbitration by order of Nisi Prius, but no verdict taken, the defendant cannot move to deprive the plaintiff of costs under 49 Geo. III. ch. 4. *Ib.*, i. U. C. R. 418.

Wrong intituling of affidavit.]—11. Where the defendant moved to

deprive the plaintiffs of costs under 49 Geo. III. ch. 4, for the difference between the amount recovered and that sworn to being only 7*l.*, and in his affidavits a wrong christian name was given to one of the plaintiffs in the style of the cause—the Court refused to allow them to be amended, and discharged the rule. *Rose et al. v. Cook*, i. U. C. R. 5.

(2), *Section II. (Judgments.)*

Proceedings under Absconding Debtor's Act after execution.—1. The Court refused to allow the plaintiff his costs in an action brought by him on a judgment, where it appeared that after execution he had commenced by proceeding by attachment under the Absconding Debtor's Act. *Keeler v. Brouse*, i. U. C. R. 348.

Refused, although there was a false plea.—2. The Court refused to allow a plaintiff costs, although the defendant pleaded a false plea of nul tiel record. *McDonald v. Clarke*, i. U. C. R. 527.

[See rules of Hilary Term, 13 Vic., number 24, regulating pleas of judgment recovered in another Court.]

V. UNDER 7 WM. IV. CH. 3, SECS. 24 AND 26. (*Demurrers*).

When costs may be recovered.—1. When the plaintiff succeeds on a demurrer to a plea in abatement, he cannot recover the costs of the demurrer under 7 Wm. IV. ch. 3, until the termination of the suit. *Richmond et al. v. Campbell*, Hil. Term, 2 Vic.

Several defendants—Verdict on demurrer for one, and against the other.—2. Where in an action of trespass against two defendants, they pleaded the general issue and separate justifications, to which the plaintiff demurred, and went to trial and obtained a verdict on the general issue, assessing contingent damages on the

demurrer, on which judgment was afterwards given for one of the defendants, and against the other: *Held*, that under 7 Wm. IV. ch. 3, secs. 24 and 26, the defendant who succeeded on demurrer was entitled to enter judgment for his costs. *Clarke v. Durham et al.*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

VI. UNDER 5 WM. IV. CH. 1, SEC. 1. (*Promissory notes*).

See div. I(1), 16.

Costs allowed in one suit only—Disbursements in others.—1. If there be two indorsers on a promissory note under 100*l.*, and the holder of the note bring several actions against them, he will under 5 Wm. IV. ch. 1, be entitled to tax his full costs in only one suit, and will be allowed no more than disbursements in the other. *Shuter v. Dee*, i. U. C. R. 292.

[By the late statute 13 & 14 Vic. ch. 59, the sections limiting the operation of 5 Wm. IV. ch. 1, to notes for 100*l.* have been repealed.]

Separate action against the acceptor and indorsers of a bill—Liability of one for the costs of the other.—2. Where the plaintiff commenced separate actions against the acceptor and indorser of a bill of exchange, and the acceptor paid the amount of the claim against him, but without the costs, and judgment was entered and execution issued against him for their amount and the costs of the suit against the indorsers, the Court ordered the writ to be restrained to the costs of the acceptor alone. *Gillespie et al. v. Cameron*, iii. U. C. R. 45.

[See also VIII. 6, *infra*.]

In what case statute not applicable.—3. A. at the assizes in Toronto sues B. as one of the indorsers on two promissory notes—one for 27*l.* and the other for 76*l.* A. recovers on the note

for 27*l.*, but having mislaid the note for 76*l.*, he enters a *nolle prosequi* as to that part of his claim. A. also brings another action in the District Court of the Niagara district against C. the maker, and D. another of the indorsers on the note, for 27*l.* *Held*, on a motion to restrain the plaintiff under 5 Wm. IV. from recovering more than the full costs of one suit, that the act did not apply. *Geddes v. Rogers*, v. U. C. R. 1.

Argument of demurrers in three separate cases on the same rule.]—4. Where separate actions were brought against the maker and indorsers of a note, and upon a demurrer by the defendant to the plaintiffs' replication, judgment was given for the defendant, and the plaintiffs applied to amend, making but one application in the three cases: *Held*, that the defendant was only entitled to the costs as for one case, in attending to oppose the application to amend. *Held also*, that as to the ordinary fee disbursed to counsel, with brief to argue the demurrer in *three* cases, and the ordinary taxable costs occasioned to the defendant by the demurrer in *each* case, that they might be allowed to the defendant. *Bank of British North America v. Ainley*, vii. U. C. R. 521.

VII. UNDER OTHER STATUTES.

43 *Eliz.*—*Trespass quare clausum fregit.*]—1. *Held*, that in action of trespass quare clausum fregit, to which the general issue is pleaded, (not per stat.), the judge who tried it may certify under 43rd *Eliz.*, to deprive the plaintiff of costs, when the damages are under 40*s.*. *Goodall v. Glen et al.*, vi. U. C. R. 14.

43 *Eliz.*—*Libel*—20*s.* damages.]—2. In an action for libel wherein the plaintiff recovered 20 shillings damages, the judge who tried the cause refused to certify under 43 *Eliz.* *Cam-*

eron et Uz. v. M'Lean, Tay. U. C. R. 524.

43 *Eliz.*—*General verdict under 40*s.**]—3. Where there are counts in trespass quare clausum fregit and de bonis asportatis, and a general verdict under 40*s.*, the judge at Nisi Prius may certify, to deprive the plaintiff of costs. *Harper v. Ward*, Mich. Term, 4 Vic.

43 *Eliz.*—*Certificate.*]—4. It is not compulsory upon a judge at Nisi Prius to grant a certificate under 43 *Eliz.* *McGuire v. Donaldson*, Tay. U. C. R. 332.

Statute 4 Anne, ch. 16, sec. 5.]—5. A judge will not certify under the statute 4 Anne ch. 16, sec. 5, to protect a defendant against paying the costs of a plea which he knows is not true in itself, but which he pleads for a collateral purpose. *McLeod v. Torrance*, iii. U. C. R. 174.

4 Wm. IV. ch. 1, sec. 53.]—6. The Court will not grant an attachment against an over-holding tenant, under 4 Wm. IV. ch. 1, sec. 53, for the non-payment of costs, until an order to pay the costs has been first served upon the tenant and a demand made. *McLachlan, In re*, iii. U. C. R. 331.

4 Wm. IV. sec. 21—*Certificate for costs.*]—7. Where in an investigation of a charge under the Petty Trespass Act, 4 Wm. IV. ch. 4, before magistrates, the plaintiff was guilty of a contempt, for which the magistrates convicted him, but without warrant, and the plaintiff brought an action for false imprisonment against them and recovered: *Held*, that the action did not arise in consequence of anything done by the magistrates under the Petty Trespass Act, and that therefore it was not necessary for the judge, under the 21st section of that act, to certify his approval of the verdict to entitle the plaintiff to his costs. *Armour v. Boswell et al.*, Trin. Term, 5 & 6 Vic.

VIII. OTHER MATTERS RELATING TO COSTS.

See AMENDMENT, II. 30; III. 12.—ARBITRATION AND AWARD, III(2), 2; IV(1), 6; IV(2), 1; VII.—ATTACHMENT, II. 3, 4, 5, 6, 8, 9, 11; III. 1, 3.—ATTORNEY, II(3), 3, 4. BAIL, III. 9.—CAPIAS AD RESPONDENDUM, 5.—CAPIAS AD SATISFACIENDUM, 2.—CERTIORARI, 4.—COGNOVIT, 3.—DOWER, III. 3, 5. EJECTMENT, IV(2); V. 9, 11; VI. ELECTION.—EXECUTOR ETC., I. 9. FOREIGN JUDGMENT, 9.—GAOLER, 1.—INDEMNITY ACT, 1.—INSOLVENT ETC., 23.—INTERPLEADER, 2. JURY, 5.—MESNE PROFITS, *passim*.—MONEY PAID, 2, 3.—NEW TRIAL, IV. 8; IX. *passim*; X. 1.—PAYMENT INTO COURT, 2.—SHERIFF, II. 5, 11, 12, 28.

Revision of taxation.—1. If plaintiffs on verdict are allowed only to tax district court costs, and the defendant neglects to take out a rule to be present at the taxation, the Court will not, after the plaintiffs have taxed district court costs, direct a revision of the taxation that the defendant's costs may be deducted under the statute. *McCall et al. v. Cameron*, i. U. C. R. 414.

Attachment for non-payment.—2. An affidavit being made of a rule for payment of costs, served and demanded, the Court will make a rule for an attachment for non-payment absolute in the first instance. *Roswell v. Hartwell*, Dra. Rep. 96.

Additional costs.—3. Where after issue joined, the plaintiff and defendant settled the action upon condition of the defendant paying the costs incurred, and they were stated at a certain sum by the plaintiff's attorney, for which the defendant gave his note payable before the assizes, and on the first day of the assizes the defendant's agent tendered the amount, reserving to himself the right of taxation afterwards, and the plaintiff's attorney refused to

receive the amount, except unconditionally, and the agent afterwards tendered it unconditionally, but it was then refused, because additional costs had been incurred, and the plaintiff's attorney took a verdict for nominal damages—the Court set the verdict aside on payment of the sum originally agreed upon, and made the plaintiff's attorney pay the costs of the application. *Ruttan v. Robertson*, ii. U. C. R. 37.

Set off.—4. Where a defendant put off a trial on payment of costs, and never having paid those costs, at a subsequent trial obtained a verdict: *Held*, that those costs could not be set off against the defendant's general costs, there being no affidavit of the defendant's insolvency. *Potts v. Doyle*, Easter Term, 6 Wm. IV.

Costs, when amendment not made at Nisi Prius according to leave granted.—5. Where in trover for a waggon, the evidence clearly established that the matter in dispute was not the waggon, but two of its wheels, and the plaintiff obtained leave to amend his declaration at Nisi Prius, by adding the wheels, but the amendment was not in fact made, and the jury gave a verdict for the plaintiff for fifteen shillings—the Court, on making the rule absolute for a new trial without costs, against which no cause was shewn, *held*, that in such a case, the amendment at Nisi Prius should have been made only on payment of costs. *Maddill v. Chilvers*, ii. U. C. R. 269.

Joint debtors—Debt paid by one—Enforcing debt and costs from the other.—6. Where judgment is recovered in an action against two parties jointly liable, and at the instance and for the benefit of one of the parties, who pays the debt with costs, the plaintiff proceeds to enforce payment of the whole amount from the other party—the Court will order the damages assessed by a jury on the breach assigned, in an action on a limit bond

given by that other party to be reduced to the costs and charges in the original action. *Gooderham v. Chambers et al.*, i. U. C. R. 172.

Ground of setting aside new proceeding.]—7. It is no ground for setting aside a new proceeding in a cause, that the costs of setting a previous irregular proceeding aside have not been paid as ordered. *Regina v. Crooks*, Easter Term, 3 Vic.

Costs of unnecessary pleadings disallowed.]—8. Where separate actions were brought by the obligee against the obligors in a joint and several bond, and the pleadings had been drawn on both sides to an unnecessary length; the plaintiff had leave to discontinue after argument on demurrer, and the master disallowed the defendant a great portion of the pleadings, which he considered had been unnecessarily pleaded—the Court discharged a rule nisi obtained by the defendant to raise the taxation with costs. *Malloch v. Grier*, ii. U. C. R. 113.

Several suits for the same cause.]—9. The Court refused to stay proceedings until payment of costs in two other suits pending for the same cause. *Richmond et al. v. Campbell*, Easter Term, 2 Vic.

[See EJECTMENT, VI.]

Defendant's attorney offering plaintiff to pay his costs, when known—Plaintiff afterwards issuing writ, without informing defendant of amount of costs.]—10. Where the defendant obtained a new trial on payment of costs, and his attorney immediately afterwards wrote to the plaintiff's attorney begging to know what the costs were that he might pay them, and the plaintiff's attorney took no notice of the letter, but after allowing some months to elapse moved in term time to discharge the rule for a new trial, on an affidavit that the costs were unpaid, and without any notice to the defendant's attorney to attend taxation, on the same day entered judg-

ment and took out a hab. fac., which was executed—the Court, on application of the defendant's attorney, set aside the judgment and writ without costs, and directed the defendant to be restored to possession. *Doe dem. Arnold v. Auldjo*, vi. U. C. R. 21.

Judgment as in case of a non-suit—Costs of commission.]—11. Notice of trial was given by the plaintiff and duly countermanded.—The defendant obtained a judgment as in case of a non-suit, in consequence of the plaintiff not having proceeded to trial according to the practice of the Court, and claimed allowance in his bill of costs for a commission to examine witnesses in the United States: he also claimed a counsel fee, and a fee for preparing a brief. These were refused by the master; and upon a motion for revision of taxation, it was held that under the circumstances of the case the master ought to have allowed the expense the defendant had been put to under the commission, notwithstanding the plaintiff had countermanded his notice of trial in due time; and with respect to brief and counsel fees, that the master should allow no disbursement to counsel with brief, nor any charge with brief which should appear either not to have been actually incurred or to have been unnecessarily incurred. *Pegg v. Pegg*, vii. U. C. R. 220.

[See *Pegg v. Pegg*, i. Cham. Rep. 190.]

Rules discharged on preliminary or substantial objections—Costs.]—12. If a rule be discharged on a preliminary objection, such as an error in the intituling of an affidavit, &c., costs will not be allowed; but if the objection be to the sufficiency of the materials on which the rule is moved, the rule will be discharged with costs. *Hughes v. Hamilton et al.*, ii. U. C. R. 172.

[See an instance, PRACTICE, II. 21.]

COSTS (SECURITY FOR).

See SECURITY FOR COSTS.

COUNSEL.

See ARREST, II. 6.—DEMURRER, 7.
QUEEN'S COUNSEL.

Fees between counsel and client.—

1. Counsel can sustain actions for such fees, to be paid to themselves by their clients, as are established according to the table of fees under the statute 2 Geo. IV. ch. 1; but where the fees claimed are not such as come within the provisions of that act, the general principle of law in England applies equally to this province, and counsel have no right of action for fees generally. *Baldwin et al. v. Montgomery*, i. U. C. R. 283.

[See further *Smith et al. v. Graham*, ATTORNEY, III. 14, (latter part thereof), COSTS, VI. 4; and VIII. 11.]

Acting as witness.—2. Where a counsel upon stating to the jury the facts he himself could prove, is reminded by the judge that he cannot act both as an advocate and a witness, and then immediately sits down, ceases to act as counsel, and gives evidence in the cause, the Court will not enforce their rule so rigidly as to set aside the verdict. *Cameron v. Forsyth et al.*, iv. U. C. R. 189.

Verdict set aside for breach of faith.—3. A. a counsel at Nisi Prius, represented to B. another counsel, that a cause was undefended; B. thereupon took a brief from the plaintiff, and A. afterwards appeared for the defence and obtained a verdict.—The Court set aside the verdict for the want of good faith in the defendant's counsel, and made him pay the costs of the application and trial. *Hamilton v. Notman*, Trin. Term, 3 & 4 Vic.

COUNTS.

See AMENDMENT, II. 17, 33; III. 2, 3, 4, 5, 6.—COMMON COUNTS.

COUNTY COUNCIL.

See DISTRICT COUNCIL.

COUNTY COUNCILLOR.

See DISTRICT COUNCIL, 12, 13.

COUNTY COURT.

See DISTRICT COURT.

COUNTY TREASURER.

See DISTRICT COUNCIL, 8, 11.—DIVISION COURT, 4.

COUNTY WARDEN.

See DISTRICT COUNCIL, 16.

COURT HOUSE.

See DISTRICT COUNCIL, 3, 18.—MANDAMUS, 17.—QUARTER SESSIONS, 3.

COURTS.

See DISTRICT COURT.—DIVISION COURT.—PRACTICE COURT.—PROBATE COURT.—SURROGATE COURT.

COVENANT.

See ARBITRATION AND AWARD, VI (2), passim.—ARREST, IV. 6.—COSTS, I(2), 1, 8.

- I. CONSTRUCTION AND OPERATION.
- II. PROCEEDINGS.
 - (1), *Action Generally.*
 - (2), *Pleadings, Evidence and Damages.*

- I. CONSTRUCTION AND OPERATION.
- See EXECUTOR ETC., I. 10.—LEASE, I.—SHERIFF, V. 4, 10, 15, 16, 20.

Covenant of seizin and of further assurance — Breaches — Dower.]—1. It is no breach against the covenantor on a covenant in a conveyance of land, that he is seized of an estate of inheritance in fee, without anything to charge or incumber the same, that his wife is alive and has not barred her dower; nor is it any breach of a covenant for further, better, and more perfectly conveying the land, that a deed of release of his wife's dower was tendered to the covenantor to be executed, and refused. *Bower v. Brass*, Easter Term, 5 Vic.

Further assurance — Dower.]—2. The right of dower which a woman has during coverture is not an interest, the release of which the covenantee can require under the ordinary covenant, for further assurance. *Hoyt v. Widderfield*, v. U. C. R. 180.

3. *Semble*: (per Macaulay, J.) That if the woman had survived her husband, an action would only lie upon an *effectual* conveyance to pass her estate having been tendered. *Ib.*

[See div. II(2), 9, *infra*.]

Condition precedent.]—4. Where the plaintiff covenanted that his son should serve the defendant for seven years, in consideration whereof the defendant covenanted at the expiration of the time to convey 200 acres of land to the son, his heirs and assigns: *Held*, that the service for seven years was a condition precedent to the right to the conveyance of the land. *Goodall v. Elmsley*, Easter Term, 4 Vic.

Word "demise," an implied covenant—Assigning breaches of such implied covenant.]—5. If the word "demise" be used in a lease, it contains an implied covenant that the lessee may peaceably enter and enjoy; and it is sufficient in an action on the lease to state the breach of such implied covenant, without having before or otherwise referred to it in the declaration. *Smart v. Stuart*, Trin. Term, 6 & 7 Wm. IV.

Covenant for good title.]—6. *Held*, that the usual covenant for good title is a covenant running with the land, and that it is no objection therefore to an action upon such a covenant, by the assignee of the covenantee against the original covenantor, that because according to the statement in the declaration, "the covenant was broken as soon as made" and could not enure to the benefit of the assignee. *Gamble et al. v. Recs*, vi. U. C. R. 396.

[Upheld in *Scott v. Fralick*, vi. U.C.R. 511.]

7. *Quære*: What would the effect be, if at the time the original covenantor's deed was given, a third party had been actually in adverse possession, or if the covenantee had been evicted before he made the deed to the assignee? *Ib.*

Right to sue for rent under the facts.]—8. A., authorised by government to settle a township, covenanted with B. that he would allot him 100 acres therein, for which he would procure a deed from the Crown as soon as the settlement duties were performed, and B. covenanted with A., that he would pay him a bushel of wheat per annum for every acre of land cleared after he had been in possession of the lot for three years: *Held*, that A. might sue for the rent after B. had been in actual possession for three years, although no deed to B. had been granted by the Crown. *McNab v. McFarlane*, iii. O. S. 287.

Preparation of papers under a covenant.]—9. *Held*, that upon the agreement set out in the report of this case, the covenantor, and not the covenantee, was the party to prepare the papers for the Bishop of Toronto to execute. *Henderson v. Nichols*, v. U. C. R. 398.

What amounts to a covenant.]—10. Where a covenant was contained in a lease, that the lessee should erect a building on the demised premises during the term, "provided always, and it is the true intent and meaning

of these presents, and the parties thereunto, that at the expiration of the demise the buildings erected shall be paid for at the valuation of two indifferent persons," &c.: *Held*, on a plea of non est factum, pleaded to a declaration treating on the part of the lease commencing "provided always," as a covenant, that the plaintiff was entitled to recover. *McFattridge v. Talbert et al.*, ii. U. C. R. 156.

II. PROCEEDINGS.

(1), *Action Generally.*

See APPRENTICE, 2, 3.—CONTRIBUTION, 2.—COVENANT, I. 5.—DISTRICT COURT, 9.—SHERIFF, V. *passim*.

Covenant, on which action brought must be express.—1. The covenant in a deed upon which a party sues must be express and distinct, and not gathered as arising consequentially, or morally by reason of something else contained in the deed. *Liddell v. Monro*, iv. U. C. R. 474.

Covenant on the proviso in a mortgage.—2. Covenant cannot be sustained on the proviso in a mortgage deed, to pay the mortgage money. *Martin v. Woods*, Trin. Term, 3 & 4 Vic.

[See div. II(2), 7, 17, 18, *infra*.]

Vendee having given a mortgage to vendor, is disabled from suing for title.—3. Where a purchaser re-conveys the same lands to his vendor by mortgage in fee, to secure payment of the purchase money, he cannot sustain an action against the vendor for breach of covenant for good title, while the mortgage continues in force. *Huyck v. McDonald*, iii. O. S. 292.

Action by heir on covenant entered into with ancestor.—4. *Held*, that an heir could not sue on a covenant entered into with the ancestor to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and

the breach having taken place in the ancestor's life-time. *Goodall v. Elmsley*, Easter Term, 4 Vic.

[See the heir's liability on ancestor's covenant for good title—HEIR, 5.]

Action by assignee of covenantee for title—Cause of action.—5. Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is, that he has not the interest he supposed he was acquiring, and which he would have had if the title of the covenantor, who executed the first deed, had been good. *Gamble et al. v. Rees*, vi. U. C. R. 396.

Eviction from part of premises, a defence to an action of covenant.—6. In an action of covenant between the original parties to a deed, an eviction from part of the premises is a good defence to the action; there can be no apportionment of the rent as in debt. *Shuttleworth v. Shaw et al.*, vi. U. C. R. 539.

(2), *Pleadings, Evidence, and Damages.*

See APPRENTICE, 3.—ARREST OF JUDGMENT, 2, 8.—COVENANT, I. 5. LEAVE AND LICENSE, 4.—NEW TRIAL, IV. 2.—PLEADING, II. 7, 10; VIII. 1.—SHERIFF, V. *passim*.—SURRENDER, 5.

Covenant for quiet enjoyment.—1. In an action for breach of covenant for quiet enjoyment, freedom from incumbrance, &c., it is sufficient for the declaration to state that one B. was seized before conveyance to the plaintiff, and that the plaintiff was obliged to pay him a certain sum (naming B.) to obtain possession, without stating eviction by B. *Bleeker v. Myers et al.*, Tay. U. C. R. 387.

Covenant for enjoyment from claims—Breach—Plea of no eviction.—2. To a count setting out a covenant that plaintiff should enjoy free from in-

cumbrances a plea stating that the plaintiff enjoyed the estate without eviction, was held not to be a sufficient answer. *Sherwood v. Johns*, Tay. U. C. R. 507.

Covenant for title—Breach—Plea of no eviction]—3. In an action of breach of covenant for good title a plea that the defendant was the right owner, &c., and that the plaintiff has had possession since conveyance made by defendant, and never has been evicted, is bad on demurrer. *Vanderburg v. Vanalstine*, Hil. Term, 7 Wm. IV.

Action against assignee of a lease—Pleas.]—4. A plea to an action of covenant against the assignee of a lease for rent due under the lease, that all the estate of the lessee in the demised premises did not come to and vest in the defendant, as the plaintiff alleges, is a good plea; but in such an action the defendant cannot plead that the lessee was seized in fee simple before the demise, and conveyed the premises to the defendant in fee, or that the lessee leased to a third party, and that third party assigned to the defendant, concluding in such a case with a special traverse of the assignment to the defendant, as such pleas amount to special pleas of nil habuit in tenementis. *Annis et al. v. Corbett*, i. U. C. R. 303.

Covenant against incumbrances in a lease—Breaches—Pleas.]—5. In an action on a covenant in a lease, that the defendant had not incumbered, charged, or affected the premises leased in any manner, and assigning as a breach that A. and B. claiming under the defendant prior to the plaintiff's lease, and having a right to certain fixtures on the leased premises from the defendant, would have entered to remove them, if the plaintiff had not paid them for them; the defendant pleaded, first, that A. and B.'s title had expired before the time, when, &c., and that they had no right at the time alleged to the fixtures, &c., concluding

to the country; and secondly, that before the lease of the plaintiff, the defendant had leased the same premises for five years to C., who had a right, under the lease, to the fixtures; on special demurrer by the plaintiff to these pleas, the Court held the first good, and the second bad. *Cameron v. Tarratt*, i. U. C. R. 312.

Covenant for delivery of stone, 216 feet to the toise—Averment of delivery.]—6. In covenant, plaintiffs agreed to deliver 200 toise of stone for the building of a wall, defendants to pay 6s. 9d. per toise, i. e., for every 216 feet cubic measure, when the wall was erected—plaintiffs averred delivery of 195 toises laid in the wall, but omitted to aver how many toises at the rate of 216 cubic feet to a toise had been laid in the wall and measured there: *Held*, bad on demurrer. (*Ma-caulay, J., dissentiente.*) *Howe et al. v. Newman et al.*, Dra. Rep. 96.

Declaration for payment of money by instalments.]—7. Where the plaintiff declared on a covenant for the payment of 250*l.*, by annual instalments of 62*l.* 10s. on the first day of January in each year, until the whole sum was paid, and assigned as a breach that on the first day of January 1845, the sum of 125*l.* became due for two instalments in the said covenant—the declaration was held good on special demurrer. *Thompson v. Chambers*, ii. U. C. R. 191.

Covenant for quiet enjoyment from all claims—Breach.]—8. Where in a covenant on a deed in fee for quiet enjoyment against all claims, the breach assigned was, that the land sold was not at the time of bargain and sale free from all incumbrances, but, on the contrary, 15*l.* were then due upon it for arrears of taxes: The declaration was held bad on special demurrer. *Wilson v. Rorke*, ii. U. C. R. 437.

Covenant for further assurance—Averment.]—9. In an action upon the common covenant for further assurance,

the covenantee must aver in his declaration that the conveyance which he required was devised by himself or his counsel, and tendered to the party to be executed. (Macaulay, J., dubitante.) *Hoyt v. Widderfield*, v. U. C. R. 180.

Fraud, how pleaded.—10. To an action of covenant on a deed, the fraud, covin, and misrepresentation of the plaintiff may be pleaded in general terms. *Lacey v. Spencer*, iii. U. C. R. 169.

[*De injuria* is a good replication to a plea of fraud, *Cowper v. Garbett*, 13 M. & W. 88.]

Action of covenant—Plea of release—Replication of fraud—Evidence under the pleadings.—11. Where in an action of covenant, to a plea of release, the plaintiff replied that it was procured by fraud and covin, on which issue was joined, and at the trial it appeared that before any breach of the covenant the plaintiff had assigned his interest in the subject matter to a third party, and that this action was brought for the benefit of such third party, whom the plaintiff and the defendant had combined to defraud by the release: *Held*, that under the pleadings, such evidence was inadmissible, as the Court could not go out of the record, and the party interested should have applied to set the release aside. *Rowand v. Tyler*, iii. O. S. 563.

Covenant for title—Breaches, want of seizin in fee, and eviction—Plea of seizin in fee—Evidence.—12. In covenant for title, the breaches assigned were, want of seizin in fee, and an eviction by a stranger, to which the defendant pleaded a seizin in fee in himself: *Held*, that on the plaintiff proving an eviction by a stranger without shewing his title, it was incumbent on the defendant to give evidence of a seizin in fee in himself. *Varey v. Muirhead*, Dra. Rep. 498.

[See *ONUS PROBANDI*, 8, 4.]

Covenant for title—Measure of damages.—13. In an action for breach of covenant for good title, no damages can be recovered for improvements or the increased value of the land, the purchase money and interest forming the measure of the damages. *McKinnon v. Burrowes*, iii. O. S. 590.

Covenant to re-purchase a lease—Damages.—14. Where A. purchased a lease from B., and B. covenanted to re-purchase it at the expiration of three years for a greater price than he paid, and after the three years had expired A. tendered an assignment of the lease, which B. refused: *Held*, that in an action on the covenant A. was entitled to recover as the amount of damages the price agreed upon by B. for the re-purchase. *Gibson v. Cubitt*, Easter Term, 2 Vic.

Lands liable for damages in covenant.—15. Under the statute 5 Geo. II. ch. 7, real estate in the colonies is liable, to satisfy a judgment for damages in an action of covenant. *Nugent v. Campbell et al.*, iii. U. C. R. 301.

Covenant—Construction of agreement, as set forth on record—Pleading.—16. Where in covenant, with non est factum pleaded, the plaintiff set out the covenant to pay £100 to the plaintiff in three months after a certain day, or as soon as the defendant returned from the United States of America, after having taken possession of certain land (which had been sold by the plaintiff to the defendant, as set forth in the declaration), or disposed of any part thereof, and the plaintiff assigned as a breach, that although the period of three months had elapsed long before the commencement of the suit, yet the defendant had not paid the money, and the defendant moved in arrest of judgment, because the plaintiff had not averred "that the

defendant had returned from the United States, having taken possession of the lands, or disposed of some part thereof"—the Court held the declaration sufficient. *Hardy v. Johnston*, ii. U. C. R. 160.

Covenant for payment of money—Breaches.—17. The plaintiff declared in covenant, against the defendant, "for that the defendant covenanted that he would pay to the plaintiff the sum of money in the proviso of the indenture mentioned upon the day and time appointed for payment thereof in and by said proviso." Breaches—"that the defendant did not, nor would pay to the plaintiff the sum of £34 15s. and interest for the same, on the day and time appointed for payment thereof as aforesaid, but therein failed and made default, &c." Demurrer thereto.—*Held*, declaration good. *Courtney v. Sinclair*, v. U. C. R. 311.

Plea to such action.—18. Declaration in covenant on a mortgage to pay a sum of money on a day named. Plea—that the defendant had not broken his covenant: *Held*—plea bad on special demurrer. *Mitchell v. Linton*, v. U. C. R. 331.

Covenant for non-payment of rent—Plea of payment to a third party.—19. Where in a covenant for non-payment of rent due on a lease made by the plaintiff to the defendant the defendant pleaded that A. was seized in fee of the premises and leased to B., whose term afterwards came to the plaintiff by assignment, and that afterwards, and while the term continued, and before action, A. distrained on the occupiers of the premises for rent due on the lease from B., and received a part of the rent from them, and the residue from the defendant: *Held*, on general demurrer, that the plea was good. *Leonard v. Buchanan*, Easter Term, 5 Vic.

COVERTURE (PLEA OF).

See ABATEMENT, 5.—ASSUMPSIT. II. 7.

CRIMINAL CONVERSATION.

A valid marriage must be strictly proved.—In trespass for criminal conversation, the plaintiff's marriage must be clearly proved; mere casual conversation of the defendant in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient admissions of the marriage to obviate the necessity of strict proof of the marriage itself. *Campbell v. Cain*, Easter Term, 7 Vic.

[Acc. *Catherwood v. Caston*, xiii. M. & W. 261.—Also, see *Rey v. Millis*, 10 Cl. & Fin. 534.]

CRIMINAL CONVICTION.

See CONVICTION, *passim*.

CRIMINAL INFORMATION.

See INFORMATION.

CRIMINAL LAW.

See CONVICTION, *passim*.—LARCENY.

Charge of murder—Bail.—1. The Court refused to discharge a prisoner brought up on a habeas corpus, charged with having murdered his wife in Ireland, communication having been made by the provincial to the home government on the subject, and no answer received, and the prisoner having been in custody less than a year; and bail in such a case will not be allowed until a year has elapsed from the time of the first imprisonment, although no proceedings have in the mean time been taken by the Crown. *Rex v. Fitzgerald*, iii. O. S. 300.

Larceny—Bail.—2. A prisoner in custody for grand larceny may be admitted to bail. *Rex v. Jones et al.*, iv. O. S. 18.

[The statute 7 Wm. IV., ch. 4, sec. 1, abolishes the distinction between grand and petty larceny.]

Charge of murder—Bail.—3. A prisoner charged with murder may in some cases be admitted to bail, and on an application for bail the Court may look into the information, and if they find good ground for a charge of felony, may remedy a defect in a commitment, by charging a felony in it. *Rex v. Higgins*, iv. O. S. 83.

Sentence.—4. A criminal convicted at a court of oyer and terminer of a capital felony, may be brought up to the Court of Queen's Bench for sentence. *Rex v. Kenny*, Mich. Term, 7 Wm. IV.

CROWN.

See CROWN GRANT, 7.—LIMITATIONS (STATUTE OF), I. 3.—SURRENDER, 1, 3.

CROWN GRANT.

See ASSUMPSIT, I. 4.—FERRY, 2. 3. SURVEY, 1.

Must be by matter of record—Effect of exemplification on defective grant.—1. A grant from the Crown must be by matter of record and under the great seal. An exemplification under the great seal of a grant invalid in its exception will not have the effect of making such grant valid by relation from its commencement. *Doe dem. Jackson v. Wilkes*, iv. O. S. 142.

Rights of grantee.—2. The King's grant gives the grantee an estate sufficient to maintain trespass without evidence of actual entry. *Clench v. Hendricks*, Tay. U. C. R. 555.

[Also, see case 12, infra.

3. *Semble*, however, that a grantee of the Crown never having taken possession is subject to the provisions of the statute 32 Hen. VIII. ch. 9, sec. 2. *Purdy qui tam v. Ryder*, Tay. U. C. R. 313.

Evidence disputing grantee's identity.—4. Evidence is inadmissible to shew that the person named in a grant is not the person for whom it was intended. *Doe dem. Baker v. Gould*, Hil. Term, 6 Wm. IV.

5. Evidence will not be received, to shew that a grant from the crown was improperly issued, so as to enable a subsequent grantee to recover in ejectment. *Doe dem. McKay v. Rykert*, Trin. Term, 3 & 4 Vic.

Description of land.—6. The description in a grant will be taken as correct, unless proved to be wrong by the clearest testimony. *Doe dem. Smith v. Meyers*, ii. O. S. 301.

[See cases 7, 8, 9, 18 and 15, infra.]

Production of grants to explain each other—Construction generally.—7. In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises—

as, for instance, what is to be considered the bank of a river—other grants from the Crown are admissible in evidence to assist the construction; and grants from the Crown, either for a valuable consideration or of special favor, are to be construed in the same manner as deeds from subject to subject. *Clark et al. v. Bonnycastle*, iii. O. S. 528.

Construction of grant conveying land to within one chain of a river.—8. A grant from the Crown conveying land to within one chain of a river, means to within one chain of the edge of the river, and not of the top of the bank of the river. *Stanton et al. v. Windeat*, i. U. C. R. 30.

Land described as extending to water's edge—Meaning thereof.—9.

Where land was granted by the Crown bordering on Lake Ontario, and was described in the grant thereof as extending to the water's edge, it was held that under this description the water's edge must be the boundary wherever it might be, and that therefore that land which was gradually and imperceptibly formed by the receding of the water would belong to the grantee, the boundary of the lake being fluctuating, and the grantee not being restricted to the land extending to where the water's edge was at the time of the issuing of the grant. Land gradually and imperceptibly formed by the washing of sand and shingle from the lake, is the property of the owner of the adjoining land, even although the formation is caused by the artificial erections of a Harbor Company who are entitled to particular privileges by act of parliament. *Doe dem. McDonald v. The Cobourg Harbor Company*, Mich. Term, 7 Vic.

[But if land be covered with water by the gradual encroachment of the sea, or an arm of the sea, the land so covered reverts from the subject to the Crown. *In re Hull and Selby Railway*, v. M. & W. 327.

Lands granted improvidently for the Rideau Canal.—10. *Quære*: Whether any grant improvidently made by the Crown of lands set apart for the Rideau Canal, before the passing of the act 7 Vic. ch. 11, would not be void at common law if injurious to the canal, without the necessity of proceeding by scire facias to repeal it? *Doe dem. Malloch v. The Principal Officers of Her Majesty's Ordnance*, iii. U. C. R. 387.

11. *Held*, that lands which had been so granted before the passing of the Vesting Act, 7 Vic. ch. 11, but afterwards marked out and reserved by the Ordnance Department as unnecessary for the canal, became again re-vested in the Crown. *Ib.*

Notice of lease from the Crown to person in possession before such lease

—*Trespass, without entry of lessee.*]

—12. Where a lessee under the Crown gave notice of his lease to a person who had been in possession of the land leased, without license, before the lease was granted: *Held*, that without actual entry, he might maintain trespass against the intruder for cutting down timber after such notice. *St. Leger v. Manahan*, Easter Term, 6 Wm. IV.

When original grant mutilated, exemplification necessary.—13. Where a party relies on a grant from the Crown, in making his title, he should procure an exemplification if the original be so mutilated that its contents cannot be accurately ascertained. *Goodtitle dem. Snyder v. Baker*, Mich. Term, 7 Wm. IV.

Control of particular description, over general statement of number of acres.—14. Where the number of acres mentioned in grant from the Crown does not correspond with the quantity of land according to the description in the grant, the description will control. *Doe dem. Manning v. Fergusson*, Hil. Term, 2 Vic.

Construction of description.—15. *Held*, that a grant from the Crown for "all that certain parcel or tract of land in the township of York, containing 200 acres, more or less, (including lot 21 in the 7th concession), being the clergy reserve lot 21 in the 6th concession west of Yonge Street, in the said township," the land not being set out by metes and bounds, conveyed to the grantee lot 21 in the 7th concession, as well as lot 21 in the 6th concession. *Doe dem. Keating v. Wyatt*, Easter Term, 5 Vic.

Adverse possession does not operate against the Crown.—16. Under a crown grant, the grantee may maintain ejectment against a person who has been in adverse possession for upwards of twenty years, and it is not necessary that the Crown should proceed by in-

formation of intrusion in such a case before the grant should specially convey the Crown's right of entry on the land to the grantee. *Doe dem. Fitzgerald v. Finn*, and *Doe dem. Fitzgerald et al. v. Clench*, i. U.C.R. 70.

Grant conveys the possession by operation of law.—17. So long as there is no other person in possession, claiming adversely to the grantee's title, the grant and title given under it carry the possession by construction of law to the owner of the fee—a visible actual possession by the owner, or by those claiming through him, need not be proved. *Doe dem. Maclem v. Turnbull*, v. U. C. R. 129.

CROWN GRANTEE.

See CROWN GRANT, *passim*.—EJECTMENT, I. 6, 26.—INTRUSION.

CROWN LESSEE.

See EJECTMENT, I. 26.

CROWN LOCATEE.

See CASE (ACTION ON THE), 3.—EJECTMENT, I. 6.

CROWN NOMINEE.

See DOWER, I. 1.—ESTOPPEL, 1, 2, 3.

CROWN AND PLEAS (CLERK OF)

See CLERK OF THE CROWN AND PLEAS.

CURRENCY.

See ACCOUNT STATED, 1.

New York Currency.—Dollars and cents are not New York currency within the meaning of the statute 2 Geo. IV. ch. 13. *Phinny et al. v. Stevenson*, i. U. C. R. 428.

CUSTOMS ACTS.

See CURRIER, 9.—GOODS SOLD, 4.—ILLEGALITY, 1.—NEW TRIAL, II. 15.—NOTICE OF ACTION, 6.—WITNESS, 23.

Certificate to officer of there being probable cause of seizure—When a defence.—1. Where a claim for goods seized for an alleged infraction of the revenue laws was brought before the commissioners of customs, under the provincial statute 4 Geo. IV. ch. 11, and the commissioners upheld the claim and restored the property to the claimant, *without any trial or verdict* passing upon the matter, but gave a certificate to the officer of customs who had seized that there was a probable cause of seizure, such certificate however not being entered of record in any way: *Held*, in an action of trespass against the officer for the seizure, that the certificate afforded him no protection, either under the provincial statute 4 Geo. IV. ch. 11, sec. 27, or the imperial statute 3 & 4 Wm. IV. ch. 59, sec. 72. *Lewis v. Kirby*, i. U. C. R. 486.

Goods entered at a port and accepted by the collector cannot be seized at another port as having been undervalued.—2. Where goods subject to an ad valorem duty have been entered at a port in this province upon the importer's own declaration of value, which the collector had accepted and acted upon, the same goods cannot afterwards be seized by the collector of another port as having been undervalued upon their entry with the first collector. *Regina v. Jagger et al.*, iii. U. C. R. 255.

Illegal seizure.—3. A collector of customs at a port of entry has no power to direct that all vessels and boats coming from a foreign country by inland navigation shall come to report at a particular place within the port; and although it is necessary that all goods, whether dutiable or not, shall

remain on board until a permit is granted to land them, yet the horses and carriages of travellers may be landed without any permit, after the arrival of the vessel in which they have been conveyed has been reported to the collector; and if the collector should seize the vessel as forfeited, either because the master did not bring his vessel to the place he had appointed, or because the horses, &c. of travellers were landed without a permit, such seizure would be illegal; and although in such a case no claim should be entered under the imperial statute 4 & 5 Wm. IV. ch. 89, sec. 25, by the owner &c. of the vessel, the collector would not be protected in an action of trespass for the seizure. *McKenzie et al. v. Kirby*, Trin. Term, 5 & 6 Vic.

When goods are liable to be seized, and not the vessel.—4. If dutiable goods be brought by inland navigation to a port of entry and there entered, and the goods are afterwards landed without a permit, they are liable to seizure, but the vessel in which they were brought is not. And if the duties on dutiable goods be offered to a collector and he refuse to grant a permit, either on the ground that the sum tendered is insufficient in amount, or for any other reason which may not be tenable, if the goods be afterwards landed without a permit they are liable to forfeiture, and the only remedy for the owner is by action against the collector for the injury which he may suffer by the refusal of the permit. *Ib.*

Evidence under, "not imported in manner and form, &c."—5. Under a plea of not imported in manner and form, &c., to an information for the condemnation of goods as illegally imported, evidence may be given that they were landed through stress of weather. *The Attorney General v. Spafford*, Dra. Rep. 333.

Information under 8 & 9 Vic. ch. 93.—6. *Quære*: Would an informa-

tion lie under the 66th clause of the imperial act 8 & 9 Vic. ch. 93, where the party informed against was a person shewn not to have transported or harbored goods of another, but his own goods, smuggled by himself on his own account? *The Attorney General v. Warner*, vii. U. C. R. 339.

Claim of a foreigner forwarding goods about to be smuggled.—7. Whether a foreigner forwarding prohibited goods to a place in the United States so situated as to furnish a strong presumption that they would be smuggled, can maintain an action for the price of such goods. See *Sawyer v. Manahan*, Tay. U. C. R. 430.

DAMAGES.

See **ABSCONDING DEBTOR**, 17.—**AMENDMENT**, III. 11.—**ARBITRATION AND AWARD**, III (1), 2, 6; IV. (3), 7.—**ASSUMPSIT**, II. 8, et seq.—**ATTORNEY**, II (1). 11.—**BILLS OF EXCHANGE, ETC.**, VIII, 2, 3, 6.—**BOND**, II. 9.—**CASE (ACTION ON THE)**, 1, 2.—**COVENANT**, II (2), 13, 14, 15.—**DISTRESS**, II. 1, 3.—**DIVISION COURT**, 6.—**DOWER**, III.—**EJECTMENT**, II. 6, 11.—**FALSE IMPRISONMENT**, 10.—**INDEMNITY BOND**, 10.—**LIBEL AND SLANDER**, III (2), 6.—**LIMITS**, II. 10.—**NEW TRIAL**, I. 4; IV. 2; X. 26.—**NUISANCE**, 2, 3.—**PENALTY**.—**PROHIBITION**, 1, 2.—**SET-OFF**, 1.—**SHERIFF**, III. 19; IV. 7.—**TROVER**, II. 5, et seq.—**VENIRE DE NOVO**, 2.

DAMAGES (ASSESSMENT OF).

See **ASSESSMENT OF DAMAGES**.

DEATH.

I. PRESUMPTION.

See **EVIDENCE**, VI.

II. PROOF.

See **EVIDENCE**, III. 1, 2.

DEBT.

See AMENDMENT, III. 11.—ARBITRATION AND AWARD, IV (3), 8; VI (2), *passim*.—ARREST OF JUDGMENT, 6.—BILLIARD TABLES, 3.—BOND, II.—DE INJURIA, 4.—DISTRICT COUNCIL, 3, 7.—FOREIGN JUDGMENT.—GAS COMPANIES, 2. HEIR, 1, 5.—INDEMNITY BOND, 5, et seq.—INDORSEMENT, I. 9.—JUDGMENT, 19.—MAINTENANCE (STATUTE OF), 18, 19.—MIDLAND DISTRICT TURNPIKE TRUST.—TORONTO AND LAKE HURON RAILROAD COMPANY.

When maintainable—Penalties.]

—1. Debt lies to recover penalties under the imperial statute 6 Geo. IV. ch. 114. *Jones qui tam v. Chace*, Dra. Rep. 334.

First instalment of a mortgage.]—

2. Debt does not lie for the first instalment of a mortgage before the others are due. *Forsyth et al. v. French et al.*, Hil. Term, 3 Vic.

Collateral undertakings.]—3. Debt on simple contract does not lie on any collateral or conditional undertaking only. *McLeod v. Tinsley*, vii. U. C. R. 40.

Consideration must move to debtor himself.]—4. To support an action of debt on simple contract it must appear that the contract has been entered into for a consideration moving to the debtor himself, and not as in assumpsit for a consideration moving from the plaintiff to a third party. *Ib.*

DECEIT.

See FRAUD.

DECK LOADING.

See CARRIER, 10, 11.

DECLARATIONS.

See DEED, III. 9.—EVIDENCE, VII. 5.

DEDICATION OF LAND FOR A ROAD.

See HIGHWAY, 5, 6, 7, 8, 9.

DEED.

See ASSIGNMENT, (DEED OF).—CROWN GRANT.—FRAUDULENT, DEED ETC.—MORTGAGE.—PROPERT.—RELEASE, I.—SHERIFF'S DEED.—SURRENDER. TROVER, I. 2, 3; II. 7.

- I. EXECUTION.
- II. CONSTRUCTION AND OPERATION.
- III. REGISTRATION.
- IV. OTHER MATTERS.

I. EXECUTION.

See EVIDENCE, V. 3, 6.

Execution by an illiterate person.]

—1. A deed executed by a person making his mark is not invalidated by the mere omission to read it over to him. *Doe dem. Biggard v. Millard*, Easter Term, 3 Vic.

Execution under power of attorney.]—2. A. received from B. a power of attorney to sell lands; under the power A. delivered to C. a deed professing to be made as follows: "Between A., by and under power of attorney, bearing date, &c., by and from one B. &c., yeoman, of the first part, and C. of the other part." Throughout the deed, A., the said party of the first part was made the grantor, and the deed was thus executed:

(Signed) A. [L. S.]
(Signed) C. [L. S.]"

Held, that A. being the granting party in the deed, and not B., B.'s interest did not pass by the deed. *Semble*: That even if B. had been made the granting party, the deed would have been inoperative, from the informal mode of execution. *Dacksteder v. Baird*, v. U. C. R. 591.

[The proper mode of signing a deed under a power of attorney, is to sign in the name of the principal. *White v. Cuyler*, 6 T. R. 176.]

II. CONSTRUCTION AND OPERATION.

See ALIEN, 1, 3.—APPRENTICE, 1, 2.
DEED, I. 2.—EJECTMENT, VIII. 10.
ESTOPPEL, 2, 3.—EVIDENCE, I. 2.
EXECUTOR ETC., I. 10.—INFANT,
1.—MAINTENANCE, (STATUTE OF),
passim.—MORTGAGE, passim.—RE-
LEASE, I.—TRESPASS, II. 28.

Description of land.—1. Where in a deed, a certain quantity of land and half of a saw-mill thereon erected were conveyed, and the description of the premises covered the whole site of the mill: *Held*, that the express words must control the operation of the deed, and that the vendee was entitled to one-half of the mill. *Doe dem. Miller v. Dixon*, iv. O. S. 101.

2. Where land is described generally in a deed as being part of lot number four, and the specific description that is afterwards given clearly shews it to embrace a part of lot number three, the specific and not the general description must be taken to govern. *Doe dem. Murray v. Smith*, v. U. C. R. 225.

3. Where land is so particularly described in a deed by its local abutments as to enable any one to find it with certainty, it is unnecessary to state further in what lot in the township the land lies. If therefore the land so described is stated to be part of lot number forty-two, when it is in reality part of lot number forty-five, the deed is nevertheless certain and good. *Doe dem. Notman v. McDonald*, v. U. C. R. 321.

[See further, CROWN GRANT, 6, 7, 8, 9, 14 and 15.]

Deed of married women's estates.

—4. If a married woman seized in fee of land execute a deed thereof with her husband, but without the acknowledgment required by 59 Geo. III. ch. 3, such deed is as to her, or her heirs, absolutely void. *Doe dem. Vansickler v. Fairwell*, Mich. Term 4 Vic.

[See cases 7, 8 and 10, *infra*, and EJECTMENT, I. 13. Also, see "LOWER CANADA."]

5. *Semble*: That care should be taken that the deed should expressly convey the interest of the husband; for if the deed merely shew that he joins for conformity and manifest his assent to his wife parting with the estate, his interest will not pass. *Doe dem. McDonald v. Twigg et al.*, v. U. C. R. 167.

6. A deed of bargain and sale, purporting to convey the real estate of a feme coverte in which the husband is not named as a party, but only the description of the feme, is not effectual, under the provincial statutes enabling married women to part with their real estates, although signed and sealed by the husband. *Doe dem. Bradt v. Hodgkins*, ii. O. S. 213.

7. Under our act 59 Geo. III. ch. 8, a deed executed by husband and wife, but without an examination of the wife and a certificate thereof, is void; so that notwithstanding the deed, the husband may maintain ejectment during the coverture. *Doe dem. McDonald v. Twigg et al.*, v. U. C. R. 167.

8. *Semble*, however, that under the more recent act, 1 Wm. IV. chap. 2, the grantee's possession cannot be disturbed during the life-time of the husband. *Ib.*

[See *Doe dem. Dibble v. Ten Eyck*, *infra*, 10.]

9. A deed of partition by a feme coverte, tenant in common, will not be binding on her estate, unless there be endorsed on the deed a certificate of her examination and consent, &c., by a judge or justice, as required by our acts 1 Wm. IV. ch. 2, and 2 Vic. 6. *McKinnon v. Arnold*, v. U. C. R. 604.

10. Under either of the provincial statutes, 43 Geo. III. ch. 5, 59 Geo. III. ch. 3, or 1 Wm. IV. ch. 2, a deed professing to convey a married woman's estate, executed by her jointly with her husband, but containing

no certificate on it of the wife having been examined as the law requires, is ineffectual to bar either *the wife or her husband during coverture or afterwards*. *Doe dem. Dibble v. Ten Eyck*, and *Doe dem. Dibble v. Menzies*, vii. U. C. R. 600.

Conveyance by devisee as heir-at-law.—11. If a party convey land as *heir-at-law* of another person deceased, though he claim as *devisee* and not as *heir-at-law*, still by his deed he conveys *all* his interest, whether as *heir-at-law* or *devisee*. *Doe dem. Clark v. McInnis*, vi. U. C. R. 28.

12. Construction of conveyance, as to the necessity of averring affirmatively, in declaring thereon, that the plaintiff had sold lands, or why he had not sold them, before he could entitle himself to sue upon the covenant for the non-payment of a sum of money. *See Kay et al. v. Gamble et al.*, vi. U. C. R. 267.

Effect of the words "to the use of."—13. It is superfluous in any deed of bargain and sale, to express that the land is to be held "to the use of" the bargainee.—The omission, therefore, of these words, can have no effect in transferring the legal title to some person other than the bargainee. *Gamble et al. v. Rees*, vi. U. C. R. 397.

Collateral security.—14. *Held*, that the deed as set out in the pleadings in this cause, shewed clearly an intention on the part of the bank to take it as collateral security, and not as an assignment in satisfaction of the notes in dispute. *Bank of British North America v. Sherwood*, vi U. C. R. 552.

III. REGISTRATION.

See MAINTENANCE (STATUTE OF), 8. MORTGAGE, 8, 14. — SHERIFF'S DEED, 5.

Registry of second deed, even with notice, secures the title.—1. Where

A. conveyed in fee to B. and died, and afterwards his heir conveyed the same land in fee to C., whose deed was registered before the deed to B.: *Held*, that C.'s deed being first registered secured him the title, although he had notice of the deed to B. *Doe dem. Pell v. Mitchener*, Dra. Rep. 484.

To gain priority, the title must be previously a registered one.—2. The Registry Act does not apply where no deed has been previously registered, so as to make a subsequent registered deed valid against a prior unregistered one. *Doe dem. Hennessy v. Myers*, ii. O. S. 424.

[Upheld in *Doe dem. Atkins v. Atkinson*, 7 *infra*, and *Neeson v. Eastwood*, 17 *infra*, and further case 19 *infra*.]

Second deed from same party registered first, although the first not registered through fraud.—3. Where a subsequent deed was registered first, a prior one from the same party was held fraudulent and void, although its registry had been prevented by the fraud of the subsequent purchaser, he having in the mean time conveyed to a third party for a valuable consideration without notice. *Doe dem. Nellis v. Matlock*, ii. O. S. 487.

Registry of a deed relates back to date thereof.—4. The registry of a deed of bargain and sale relates back to the time the conveyance was made so as to give the purchaser a good title from that period. *Doe dem. Spafford v. Brown et al.*, iii. O. S. 92.

Conveyance of growing timber must be registered.—5. Growing timber is so far real estate, that to be severed from the inheritance by deed or devise, the conveyance or will must be duly registered, to pass the interest intended to be conveyed. *Ellis v. Grubb*, iii. O. S. 611.

[See case 7, *infra*.]

Registry of a subsequent deed of land previous to registry of a prior deed of timber, with notice.—6. Mere notice of the execution of a

previous deed for the sale of growing timber will not defeat the operation of a subsequent conveyance of the land, if the latter be registered first. *Ib.*

Registry of bargain and sale not necessary to make it valid.—7. The Registry Act does not apply where there has been no previous registered deed; and since the statute 4 Wm. IV. ch. 1, sec. 47, a deed of bargain and sale does not require registry nor enrolment, to make it a valid conveyance. *Doe dem. Adkins v. Atkinson*, iv. O. S. 140.

Deed poll operates as a bargain and sale—4 Wm. IV. ch. 1, sec. 47, *retrospective.*—8. A deed poll will operate as a bargain and sale; and the statute 4 Wm. IV. ch. 1, sec. 47, has a retrospective operation so as to make deeds of bargain and sale executed before the act valid, without registry. *Rogers et al. v. Barnum*, Trin. Term, 6 & 7 Wm. IV.

[See also, *Doe dem. Loucks v. Fisher*, infra 14.]

Declaration of execution made in England under 5 & 6 Wm. IV. ch. 62.—9. The Court refused a mandamus to compel the registrar of a county to register a deed on a declaration of its execution made in England under 5 & 6 Wm. IV. ch. 62, which substitutes declarations for oaths in certain cases, as that act does not extend to the colonies. *Lyons In re*, Hil. Term, 7 Vic.

[But see 9 Vic. ch. 34, sec. 10.]

Action against registrar for treble damages, when maintainable.—10. An action cannot be brought against a registrar for treble damages under the 10th section of the act 35 Geo. III. ch. 5, until he has been convicted under that section of some offence for which he shall forfeit his office. *Hamilton v. Lyons*, Easter Term, 7 Wm. IV.

Certificate of registry cannot be impeached by evidence.—11. The certificate of registry indorsed on a

deed is conclusive of the registry, and cannot be impeached by evidence that it has been irregularly done. *Doe dem. Russell v. Gillett*, Mich. Term, 3 Vic.

Only prima facie, not conclusive evidence.—12. The certificate of registry indorsed on a deed under 35 Geo. III. ch. 5, sec. 5, is prima facie evidence only of registry, and is not to be taken as incontrovertible evidence of the fact, of registry, so as to exclude all proof to the contrary. *Doe dem. McLean v. Manahan*, i. U. C. R. 491.

[See MORTGAGE, 8.]

Evasion of registry laws.—13. Where A. holding land under a registered title, sold to B., whose deed was not registered, and B. sold the land to C., and after sale, sold it again to D., who registered his deed, the deed to C. not having been registered: *Held*, that C. could not, by obtaining and registering a release for a nominal consideration from the heir of A., obtain priority over D., as C. could not be considered, as to the release, a subsequent purchaser for a valuable consideration. *Doe dem. Major v. Reynolds*, ii. U. C. R. 311.

4 Wm. IV. ch. 1, sec. 47, *retrospective.*—14. The provincial statute 4 Wm. IV. ch. 1, sec. 47, which declares that it shall not be necessary to enrol or register a deed of bargain and sale for the mere purpose of passing the land, applies to such deeds executed before as well as since the passing of that statute. *Doe dem. Loucks v. Fisher*, ii. U. C. R. 470.

Registrar must receive affidavits, sworn before commissioners, as well within as without his county.—15. Under the 7th clause of the Registry Act, 8 Vic. ch. 34, the registrar of a county is bound to receive proof of deeds, by affidavits sworn before a commissioner of this Court, as well where they are executed within the county as without. *Registrar of the*

County of York, In re, iii. U. C. R. 188.

*Re-registry under 56 Geo. III. ch. 16, and 36 Geo. III. ch. 5, sec. 2.]—*16. A., the grantee of the Crown, conveys to B., B. conveys to C.—The conveyance from B. to C. is registered in the Niagara District, before the war of 1812.—The record of registration is burnt during the war.—C.'s deed is not re-registered according to the provisions of the 56 Geo. III. ch. 16.—C., after the war, conveys to D., who does not register his deed, C. again conveys to E., without consideration, who registers.—E. conveys to F. for a valuable consideration, who also registers: *Held*, that C. not having re-registered his title in compliance with the provisions of the statute 56 Geo. III. ch. 16, had not the effect of securing the title to D., by making C.'s title an *unregistered title* at the time of his conveyance to E. *Held also*, that F. having given a valuable consideration for his deed from E., the fact that E. had given no consideration for his deed from D. would not defeat the operation of the Registry Act, 35 Geo. III. ch. 5, in favor of F.'s registered title as against D.'s prior unregistered one. *Doe dem. Matlock v. Disher*, iv. U. C. R. 14.

*Evidence necessary to postpone prior unregistered deed.]—*17. In order to postpone a prior deed on account of non-registry, evidence must be given at the trial to shew the title a registered one, before the prior deed was given. *Neeson v. Eastwood et al.*, iv. U. C. R. 271.

*Trust deeds for creditors.]—*18. The second clause of the Registry Act 35 Geo. III. ch. 3, does not apply to deeds given to trustees for the benefit of creditors. *Ib.*

*To gain priority a valuable consideration must be shewn.]—*19. A party who claims under a subsequent conveyance, and seeks to displace the first by reason of the prior registry of

his deed, must, before he can recover in ejectment, give some proof that he stands in the position of a purchaser or mortgagee for valuable consideration. The production of the subsequent deed, stating on the face of it a valuable consideration, affording no evidence of consideration as against a stranger, will not do. *Doe dem. Cronk et al. v. Smith*, vii. U. C. R. 376.

*Registrar not entitled to fees for entry in the margin of memorials.]—*20. Under the Registry Act 9 Vic. ch. 34, the registrar has no right to charge fees for the entry he makes in the margin of memorials. *Keele v. Ridout*, v. U. C. R. 240.

*Fees, when lands in several townships.]—*21. *Held*, that under the Registry Act, 9 Vic ch. 34, the registrar must record the memorial of a deed, &c., in every township of his county in which the lands embraced in the deed are situated. *Also*, that he need not enter in the book of any township other lands than those lying in that township. *And also*, that his proper fees are 2s. 6d. for the first hundred words of the registration in each book, and 1s. for every hundred words over the first hundred in such registration. *Smith et al. v. Ridout*, v. U. C. R. 617.

IV. OTHER MATTERS.

See ARBITRATION AND AWARD, IV (1), 10.—BOND, I. 4, 10.—COVENANT, I. 1, 2, 3, 6; II(1), 3, 5; II (2), 1, 2, 3, 5, 8, 9, 12.—EJECTMENT, VIII. 15.—EVIDENCE, II. 5. HIGHWAY, 6.

*Court will set aside deeds if fraud be practised in obtaining them—Evidence of fraud.]—*1. A court of law has power to set aside a deed where a jury finds that actual fraud had been practised in obtaining it, and although mere inadequacy of price is no ground for impeaching a conveyance, yet, when taken in connection with the mental imbecility of the party executing

it, it goes strongly to prove fraud. *Doe dem. Jones v. Capreol*, iv. O. S. 227.

Presumption of deed after twenty years' possession.]—2. Where a conveyance ought to have been made, the Court will presume that one has been made after a peaceable possession for twenty years. *Doe dem. Wilson et al. v. Wessels*, Trin. Term, 6 & 7 Wm. IV.

DEEDS OF ASSIGNMENT.

See ASSIGNMENT.—FRAUDULENT DEED ETC., *passim*.

DEFAMATION.

See LIBEL AND SLANDER.

DE INJURIA.

See BILLS OF EXCHANGE ETC., V. 27; VI. 5; VII. 4, 6.—COMPOSITION. INDEMNITY BOND, 5.—PATENT, 1. SHERIFF, IV. 2.

Plea, setting up matter of excuse—Replication, de injuria.]—1. The defendants pleaded that the note was indorsed to the plaintiff by the payee in fraud of the defendants and without consideration, to deprive the defendants of a right of set-off which they had at the time of the indorsement against the payee; the plaintiff replied *de injuria*.—Demurrer, that the replication is inapplicable, the plea being in discharge of the note: *Held*, replication good, the plea containing matter of excuse and not matter of discharge. *Quære*: Is not the plea double? *Rat-tray v. McDonald et al.*, iii. U. C. R. 354.

Trespass quare clausum fregit—Plea, making title and giving color—Replication, de injuria.]—2. Where in trespass quare clausum fregit and de

bonis asportatis, the defendants make title in their plea and give color, the plaintiff cannot reply generally as to a plea of *liberum tenementum*, but must traverse the title alleged, or reply specially; and to reply to a plea justifying the removal of the goods, as incumbering the defendants' close, that the defendants were not lawfully possessed, or *de injuria* generally, where the defence pleaded rests upon a title or possession not connected with the personal conduct of the parties, is bad. *Thompson v. Breakenridge et al.*, iii. O. S. 170.

To justification under a warrant.]—3. A replication *de injuria*, to a justification under a warrant, is good. *Blair v. Bruce*, Trin. Term, 1 & 2 Vic.

Debt—Plea of payment—Replication, de injuria.]—4. Where in debt for rent on an indenture of demise, the defendant pleaded payment to the superior landlord to avoid distress, and the plaintiff replied *de injuria* generally: the replication was held bad on general demurrer. *Leonard v. Buchanan*, Mich. Term, 6 Vic.

Action on a note—Plea, no consideration and plaintiff not the holder—Replication, de injuria.]—5. A., one of the defendants, was sued as maker of a promissory note, payable to D. or order, and indorsed to the plaintiff.—He pleaded, 1st, want of consideration for making the note, that it was made by him and indorsed by D. for plaintiff's accommodation. 2ndly, That before the note was due, and after the plaintiff took it by indorsement, he indorsed it over to a third party for value, who is now the holder of the note, and to whom, and not to the plaintiff, the defendant is liable. The plaintiff replied *de injuria* to these two pleas in one replication, which the defendant demurred to: *Held*, replication good to first plea, but bad to second plea. *McCuniffe v. Allan et al.*, v. U. C. R. 571.

Plea, failure of consideration, or want of consideration—Replication, de injuria.]—6. The replication de injuria, to a plea setting up as a defence to a note a failure of consideration, or want of consideration, is good. *Macfarlane v. Kezar et al.*, v. U. C. R. 580.

Trover—Defence of seizure in execution—Replication, de injuria.]—7. The special title which a sheriff acquires in goods seized by him in execution, when pleaded as a defence to an action of trover, may be well answered by the replication de injuria. *Boswell v. Ruttan*, vi. U. C. R. 199.

8. The allegation by way of express color in a plea, is not traversed by the replication de injuria. *Ib.*

DELIVERY ORDERS.

Nature of delivery orders for wheat in warehouses—Liability of seller to purchaser of wheat, upon warehouseman actually refusing to deliver.]—Where A. having 217 bushels of wheat stored in B.'s warehouse, gave C., who had paid the price of the wheat, a delivery order upon the warehouseman B., and B. upon the delivery bond being presented refused to deliver the wheat to C., until he (the warehouseman) had been previously satisfied a demand of his own against C., wholly unconnected with the transaction between A. and C.: *Held*, that upon such refusal C. could sustain an action against A. for the non-delivery of the wheat, the delivery order when given to the purchaser not being an actual delivery of the wheat, but merely an evidence in the hands of the seller that he had the wheat in B.'s warehouse, and in the hand of the purchaser that he had the right to demand the wheat from B. *Proudfoot v. Anderson*, vii. U. C. R. 573.

DEMAND.

See ELECTIONS.—EVIDENCE, VIII.5.

DEMAND OF PLEA.

See PRACTICE, I. 1.

DEMAND OF POSSESSION.

See EJECTMENT, I. passim.

DEMAND (PARTICULARS OF).

See PARTICULARS OF DEMAND.

DEMISE (IN EJECTMENT).

See AMENDMENT, II. 8, 17, 18.—EJECTMENT, II. 1, 2, 6, 9, 11; V. 4; VIII. 19.—LEASE.—PRESBYTERIAN CHURCH, GALT.—RELIGIOUS SOCIETIES, 3.

DEMURRAGE.

What demurrage recoverable under common count.]—1. The count for demurrage can only authorize a recovery for a sum of money due on an express contract to pay demurrage eo nomine, not a recovery for demurrage for wrongfully detaining the vessel when nothing had been specified about demurrage. *Brown v. Ross et al.*, v. U. C. R. 496.

Action for freight—Demurrage—Agreement—Evidence—Misjoinder of counts.]—2. The plaintiffs were owners of the Lady Bagot, in which wheat was brought down Lake Erie to the defendant, to be stored for Messrs. Young & Co. When it was brought to the defendant the master of the schooner demanded 22l. 10s. for freight and 190l. for demurrage, and said he had a lien on the wheat to that amount, and wished the defendant to pay it before he would deliver the wheat. This the defendant declined, but it was agreed between them that the defendant should receive the wheat upon giving the following undertaking in

writing: "I will retain 750 bushels of wheat, the property of Messrs. Young & Co. of Montreal, and part of the cargo of the Lady Bagot, until your claim for demurrage for detention of the schooner Lady Bagot at Sandusky is settled, also covering freight on amount retained." The plaintiffs subsequently demanded the wheat from the defendant, who, although still retaining it in his possession, declined to give it up to the plaintiffs, saying that he was indemnified by Messrs. Young & Co., who refused to pay the plaintiffs' claim. The plaintiffs upon these facts sued the defendants on three counts: 1st, specially upon the case, alleging the plaintiffs' right to lien for freight and demurrage, then setting out the agreement, and assigning as a breach of the defendant's duty his delivering the wheat to Messrs. Young & Co. without payment of plaintiffs' lien: 2nd, upon an agreement to redeliver the wheat to the plaintiffs when requested, and a breach of duty in not delivering: 3rd, in trover. *Held*, that the evidence did not support the first count, as the defendant still retained the goods; nor the second, as there was no agreement to deliver to the plaintiffs; nor the third count, as the agreement admitted the property in the wheat to be in Young & Co., and not in the plaintiffs. *Held also*, that the second count, being properly in assumpsit, could not be joined with the count in trover, and that the plaintiffs under the circumstances had no lien for either freight or demurrage. *Land et al. v. Woodward*, v. U. C. R. 190.

DEMURRERS.

See ACCORD AND SATISFACTION, 9. AMENDMENT, II. 22.—ARREST OF JUDGMENT, 4.—ASSESSMENT OF DAMAGES, 1.—COSTS, V.—NULTIEL RECORD, 1.—PARTITION, 2.—PRACTICE, I. 12, 22.—SIMILITER, 2.

Withdrawal.—1. The Court gave leave to withdraw a demurrer upon payment of costs and pleading issuable, though the plaintiff had lost a trial. *Tully v. Graham*, Tay. U. C. R. 45.

[If a defendant demur to a declaration, and the plaintiff amend on paying the costs of the demurrer to the defendant, that is equivalent to a withdrawal of the demurrer, and entitles the defendant to plead de novo. *Smith v. Hearn*, xii. M. & W. 715.]

2. When a demurrer has been argued and judgment pronounced it cannot be withdrawn if the trial has been lost, although the plaintiff would have to assess his damages. (Sherwood, J. dissentiente.) *Bell v. Stewart*, Dra. Rep. 168.

3. Leave to withdraw a demurrer to a plea of accord and satisfaction to an action for breach of covenant, was refused. *Bayard v. Partridge*, Tay. U. C. R. 558.

Joinder in demurrer.—4. A plaintiff who has demurred to a defendant's plea, cannot sign interlocutory judgment for the want of such joinder, his proper course being to add it himself. *Murney v. Heron*, Easter Term, 7 Wm. IV.

Special demurrer—Nullity.—5. A plaintiff cannot treat a special demurrer as a nullity, and sign judgment for want of a plea, though the demurrer may appear frivolous. *Soper v. Draper et al.*, ii. O. S. 289.

Amendment.—6. *Semble*: That a demurrer cannot be amended without the consent of the opposite party; where, therefore, the defendant, intending to demur to the replication to the second plea, did in fact demur to the replication to the first plea: *Held per Cur.*, that they could not decide upon this demurrer as if it were a demurrer to the replication to the second plea. *Perry v. Grover*, v. U. C. R. 331.

Counsel's signature.—7. Where a demurrer was signed "A. B., defendant's attorney," A. B. being both the counsel and attorney for the defendant:

Held, that the signature was sufficient, as the words "defendant's attorney" might be rejected as surplusage. *Le-moine v. Raymond*, Hil. Term, 5 Vic., P. C.. McLean, J.

Pointing out defects, when special.]—8. If an objection to a pleading be taken on special demurrer, it must distinctly point out the defect objected to. *Small v. Beasley*, iii. U. C. R. 40.

Withdrawal of demurrer—Judgment on whole record.]—9. Where a plaintiff demurred specially to a plea of the defendant's, confessing the action, because it concluded neither in bar nor abatement—the Court, in giving judgment against the demurrer, allowed the plaintiff to withdraw it on payment of costs, and to take judgment on the whole record. *Stocking v. Campbell*, Hil. Term, 5 Vic.

Exceptions unnoticed in books.]—10. Where exceptions in pleadings are not noticed in the demurrer books delivered, nor any notice of them given into the Court before argument, they cannot be urged. *Ferrie et al. v. Lockhart*, iv. U. C. R. 477.

Taking exceptions to declaration on second demurrer.]—11. After judgment has been once given on the record against the defendant, upon demurrer to his pleas, and he has been allowed to add another plea, which when demurred to he abandons: *Held*, that he cannot be allowed on this second demurrer to take exceptions to the declaration, the Court having already adjudged it to be good. *Hobson v. The Wellington District Mutual Fire Insurance Company*, vii. U. C. R. 19.

Exceptions to declaration omitted after demurrer.]—12. Where no notice of an exception to declaration after demurrer to plea has been given, the Court will not entertain such exceptions of their own accord, unless the declaration shew that on the facts

stated the plaintiff really has no ground of action. *Shouldice v. Fraser*, vii. U. C. R. 60.

Demurrer for misjoinder of counts.]—13. A demurrer for a misjoinder of counts must go to the whole declaration; where therefore, the defendant demurred to the second count of a declaration, and the plaintiff demurred to the pleas to the first count, *semble*, that upon the argument of the demurrers the plaintiff could not object, on exceptions taken to the first count of the declaration, that the whole declaration was bad for misjoinder of counts. *Quin v. The School Trustees*, vii. U. C. R. 130.

Demurrer to replication, concluding to the country.]—14. The defendant, though the replication complete the issue, may refuse to be concluded by it, and if he think proper, demur, provided he does so within the ordinary time of pleading. *Gordon v. Cleg-horn*, vii. U. C. R. 171.

Defendant not allowed to object to declaration from nature of demurrer.]—15. Where the defences were severally pleaded to the several counts of a declaration, and demurred to, and not supported, and on the argument of the demurrer an exception was taken to the whole declaration that it was bad for a misjoinder of counts, the first and third counts being in assumpsit and the third in case—the Court, though they admitted the declaration to be bad for the reason assigned, would not give judgment against the plaintiff, the question upon the inconsistency of the declaration as a whole having been raised under the demurrer. *McLeod v. Eberts et al.*, vii. U. C. R. 251.

Leave to amend—Filing a special demurrer in lieu.]—16. Where a party who had obtained leave to amend his replication, filed a special demurrer in its stead, and a judge in chambers set the demurrer aside: *Held*, upon an application to rescind the judge's

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order, that the judge had properly decided. *The Gore Bank v. Chase*, vii. U. C. R. 454.

Rule with stay of proceedings—Notice of argument of demurrer irregular.—17. Where a rule with a stay of proceedings has been taken out and served to shew cause why a verdict rendered should not be set aside for irregularity, a notice of argument of demurrer, and the setting down the same demurrer given subsequently to the rule, will be set aside with costs. *City Bank v. Eccles*, v. U. C. R. 633.

DEPARTURE IN PLEADING.

See PLEADING, V.

DEPOSIT ON SALE.

See AUCTION ETC., 3.

DEPUTY CLERKS OF THE CROWN.

See ATTACHMENT, I. 1.—CAPIAS AD SATISFACIENDUM, 11.—INTERLOCUTORY JUDGMENT, 13.—JUDGMENT, 10, 11.—SHERIFF, II. 1.

DEPUTY SHERIFFS.

See BOND, II. 12.—ESCAPE, 18.—SHERIFF, I. 12; III. 9; V. 17.—SHERIFF'S DEED, 4.—WITNESS, 15.

To charge a sheriff with the acts of his deputy done colore officii, it is enough to prove the authority of such deputy by general reputation. *Holt v. Jarvis*, Dra. Rep. 200.

DESCRIPTION OF PREMISES.

I. IN DEEDS AND WILLS.

See CROWN GRANT, 6, 7, 8, 9, 14, 15.—DEED, II. 1, 2, 3.—EVIDENCE, I. 3.—SHERIFF'S DEED, 6.—SURRENDER, 3.—SURVEY, 1.—WILL, 3, 8.

DISTRESS.

II. IN DECLARATIONS OF EJECTMENT, AND CONSENT RULES.

See AMENDMENT, II. 3.—EJECTMENT II. 5, 10; IV(1), 1, 2, 3, 5, 7.

DETINUE.

See TROVER, I. 3.

DEVASTAVIT.

See CAPIAS AD SATISFACIENDUM, 4.

DEVISE.

See WILL.

DIES NON.

See SUNDAY.

DISCLAIMER.

See EJECTMENT, I. 2, 8, 9, 10, 11, 12, 27.—TRUST AND TRUSTEE, 1, 2.

DISHONOR (NOTICE OF).

See BILLS OF EXCHANGE ETC., III. passim.

DISSOLUTION OF PARTNERSHIP.

See ARBITRATION ETC., III(1), 2; III(2), 9.

DISTRESS.

See TAXES, passim.

I. RIGHT OF DISTRESS, AND PROCEEDINGS THEREUNDER.

II. ACTIONS FOR EXCESSIVE, IRREGULAR, OR WRONGFUL DISTRESS—PLEADINGS AND DAMAGES THEREIN

I. RIGHT OF DISTRESS, AND PROCEEDINGS THEREUNDER.

See BY-LAWS, 1.—EJECTMENT, VIII. 16.

Rent payable in produce.—1. A distress may be made for rent for a sum certain, payable in produce at the market price, and such distress may be sold. *Thompson v. Marsh et al.*, ii. O. S. 355.

Rent payable in leather.—2. A rent of a sum certain reserved, payable in leather, may be distrained for. *Cumming v. Hill*, Hil. Term, 5 Vic.

Yearly tenancy—Time to distrain.—3. A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year as the first if the tenant remain in possession of the premises, and the landlord may distrain for the first year's rent at the end of the second year; and the Real Property Act, 4 Wm. IV. ch. 1, sec. 20, does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards. *McClenaghan v. Barker*, i, U. C. R. 26.

Present demise.—4. Memoranda or heads of agreement, ascertaining no certain amount of rent, being preparatory to a letting, and under which no rent has been paid before the distress, do not constitute a present demise, entitling the landlord to distrain. *Cheney et al. v. Taylor*, i. U. C. R. 166.

Distress on stranger to lease.—5. A. demises to B. for a certain term, B., during the term absconds and abandons the property, C. finding the place vacant, puts a person in possession, and makes a demise to D.—A. distrains for rent under his lease to B.: *Held*, distress legal. *Rudolph v. Bernard*, iv. U. C. R. 239.

Made more than six months after expiration of tenancy—Continuation of tenancy.—6. A distress made more than six months after the expiration of a tenancy is illegal, and a con-

tinuation of the tenancy will not necessarily be implied from the party's remaining in possession of the premises without any act to shew the nature of the holding. *Soper v. Brown et al.*, iv. O. S. 103.

Right of landlord to distrain when his interest has ceased.—7. A landlord cannot distrain where his interest in the estate has expired before the distress. *Hartley et al. v. Jarvis*, vii. U. C. R. 545.

When cattle may be taken on the highway.—8. Cattle may be taken on the highway as a distress, if driven off the land in the view of the bailiff; and if the legality of a distress turn upon the place of seizure, as whether it was a highway or not, that point should be left clearly to the jury. *Halsted v. McCormack et al.*, Easter Term, 3 Vic.

Fraudulent removal—Following goods.—9. In case of a fraudulent removal the landlord can follow the goods of his tenant only, and not those of a stranger, which had been on the premises. *McArthur v. Walkley et al.*, Mich Term, 4 Vic.

Vessels attached to a wharf not liable.—10. Where a wharf has been leased, "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained for rent. *Sanderson et al. v. The Kingston Marine Railway Company*, iii. U. C. R. 168.

Hop poles.—Hop poles left standing in the ground, after the hops growing upon them have been gathered, are not distrainable. *Alway v. Anderson*, v. U. C. R. 34.

Sufficiency of warrant.—11. It is not necessary that a bailiff, to distrain for rent, should have a written warrant of distress, for if the warrant be insufficient, but the landlord adopt the distress, the bailiff may justify under him. *Halsted v. McCormack et al.*, Easter Term, 3 Vic.

Right of executors to distrain for rent.—12. A testator, by his will, desires that his executors shall sell and dispose of his land, and then nominates and appoints his executors, their executors and administrators, to seal, execute, and deliver any deeds, that may be necessary for making a title to the purchaser: *Held*, that this devise vested no interest in the executors, but gave them a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold. *Nicholls v. Cotter*, v. U. C. R. 564.

Party acting as principal justifying as bailiff.—13. Where a party assumes to act as *principal* in making a distress for rent, he cannot afterwards justify as *bailiff* on the subsequent confirmation of the party entitled to the rent. *Lambert v. Marsh*, ii. U. C. R. 39.

Breaking outer door of sub-tenant's apartment.—14. Where a sub-tenant has an apartment to which there is an outer door, it is illegal to break into that apartment to make a distress. *McArthur v. Walkley et al.*, Mich. Term, 4 Vic.

Verbal notice by landlord to sheriff.—15. A verbal notice from the landlord to the sheriff will be sufficient to save the year's rent; and if it can be shewn that the sheriff knew of the rent being due, a formal notice from the landlord would not be necessary. *Brown v. Ruttan*, vii. U. C. R. 97.

[Also see LANDLORD AND TENANT, I. 9.]

Right of mortgagee to distrain.—16. Where a mortgagee receives rent from a tenant, who had become such by lease from the mortgagor subsequent to the mortgage, but afterwards directed the tenant to pay the rent to the mortgagor, which he accordingly did: *Held*, that the mortgagee could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent. *Lambert v. Marsh*, ii. U. C. R. 29.

II. ACTIONS FOR EXCESSIVE, IRREGULAR, OR WRONGFUL DISTRESS—PLEADINGS AND DAMAGES THEREIN.

See REPLEVIN, *passim*.

Property allowed to remain more than five days after seizure—Trespass.—1. Trespass lies for the sale of property seized as a distress and allowed to remain on the premises more than five days after seizure, but the full value of the property cannot be recovered. *Thompson v. Marsh et al.*, ii. O. S. 355.

[See case 8, *infra*.]

Form of action for excessive distress.—2. Where a landlord distrained for rent due, and also at the same time for rent not due: *Held*, that as the distress was legal in its inception, but excessive, that case and not trespass was the proper remedy. *Kendrick v. Lee*, Mich. Term, 3 Vic.

Irregularity in distress—Damages.—3. In case for an irregular distress, if there were any irregularity, as if there had been no appraisement, the plaintiff is entitled to a verdict for nominal damages, although no damages whatever be proved. *Maguire v. Post*, Hil. Term, 6 Wm. IV.

Distress without rent being due—Declaration.—4. In an action upon the statute 3 Wm. & M. ch. 5, for taking a distress when no rent was due, it is not necessary to set forth in the declaration any tenancy between the parties, it is sufficient if it appear that the seizure was made under color of a distress. *Stoddard v. Arderly*, Hil. Term, 5 Vic.

Appraisement.—5. It is no plea to a declaration for selling a distress without appraisement by two sworn appraisers, that the sum distrained for was under 20*l.*, and that an appraisement was made by one appraiser under 1 Vic. ch. 16. *Ib.*

Special traverse to replication of surrender.—6. Where in trespass for taking goods, the defendant having

justified under a distress for rent, the plaintiff replied a new lease by which the demise under which the distress had been made was surrendered and determined by operation of law, and the defendant rejoined specially traversing the surrender, it was held that the special traverse was bad, as it was matter of law. *Strathy v. Crooks*, i. U. C. R. 44.

Case for excessive distress—Declaration—Count contrary to 1 Vic. ch. 16, sec. 4.]—7. Where in an action on the case for an excessive distress a count charges the *landlord* with selling the goods for extortionate and illegal charges, such count being contrary to the provisions of 1 Vic. ch. 16, sec. 4, cannot be sustained. *Nichol v. Mooney et al.*, i. U. C. R. 199.

Property sold must be removed within a reasonable time.]—8. The purchaser of property sold for rent must remove the same from off the premises within a reasonable time after the sale. If property be sold on the 15th of February, and the purchaser enters to remove it from off the premises on the 26th of March following, he will be liable as a trespasser. *Alway v. Anderson*, v. U. C. R. 35.

DISTRICT (NOW COUNTY) COUNCIL.

See CORPORATION, 7.—MANDAMUS, 17.

Power to sue for debts.]—1. A municipal council can in their corporate name enforce payment of debts due to the district in cases in which neither the magistrates nor their treasurer could have sued formerly, but they cannot vary or abridge the rights of the parties, nor alter any contract, express or implied. *The Ottawa District Council v. Low et al.*, Trin. Term, 7 Vic.

Description of, under act.]—2. Where in trespass quare clausum

fregit, the defendant justified under a by-law passed by the "Municipal Council of the District of Wellington," and the plaintiff demurred specially, shewing for cause that there was no such corporate body as that described in the plea—the Court held, that under the Municipal Council Act the corporation was sufficiently described. *Flewellyn v. Webster*, Mich. Term, 7 Vic.

Debt against, for cause of action before district erected.]—3. An action of debt is maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the district before the district was set apart; and it is sufficient in the declaration to describe the building committee as such, without naming the persons of which it was composed. *Keating v. The Council of the District of Simcoe*, i. U. C. R. 28.

Fees of clerk of the peace.]—4. The payment of certain fees to a clerk of the peace by a district council in accounts rendered for services in former years, will not prevent their afterwards disputing the charges in the accounts of subsequent years. *Askin v. The London District Council*, i. U. C. R. 292.

Action by clerk for such fees.]—5. An action will not lie against the district council for fees charged for services performed by a clerk of the peace. *Ib.*

Right to sue upon bond given to the treasurer for the collection of rates.]—6. The Municipal Council Act, 4 & 5 Vic. ch. 10, invests in the municipal council of each district the power of suing on a bond given to the treasurer of the district for the due payment over to him of the rates received by the collector; and it is sufficient to aver in the declaration that the monies collected are due and payable to the treasurer. *Eastern District Council v. Hutchins*, i. U. C. R. 321.

[See *O'Connor v. Clements et al.*, infra, 8.]

Enforcing verdict of jury—Form of declaration against.]—7. Where the plaintiff brought an action of debt on the common counts. against the Huron District Council for compensation awarded to him by a jury for making a road across his premises before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded—the Court held, that the action would not lie against the Huron District Council at all; but even if the council had been responsible, the declaration should have been special. *McKee v. The Huron District Council*, i. U. C. R. 368.

Right to sue upon bond to district treasurer for collection of rates.]—8. The Municipal Council Act, 4 & 5 Vic. ch. 10, does not vest in the municipal councils of the several districts the right of suing upon bonds given by collectors of assessments to the treasurer of the district *after that act was passed*, but on such bonds the treasurer of a district can sue in his own name. *O'Connor v. Clements et al.*, i. U. C. R. 386.

Right to sue each other.]—9. One district council may sue another district council for a cause of action connected with their public duties, and the balance of district revenue which one district holds from another affords legal ground for such an action. *Huron District Council v. London District Council*, iv. U. C. R. 302.

Actions against—Notice—Request, and other necessary averments.]—10. A district council cannot be sued upon the common money count on the account stated, unless at least the subject matter of the account be averred, and it is seen to be such as can by law create a debt from the defendants to the plaintiffs to be satisfied out of the funds of the district. *Semble*: That it was not necessary

before action to give a notice to the treasurer of the London district of the claims of the plaintiffs against the district. *Semble, also*: That it was necessary, in order to a right of action, to aver a request from the plaintiff to the defendant to pay over the money due. *Semble, also*: That in suing for a debt due by the district under the 43rd clause of 4 & 5 Vic. ch. 10, it should be averred that the defendants have funds to pay the debt, after discharging the demands to which the 59th clause gives a preference. *Huron District Council v. London District Council*, iv. U. C. R. 302.

Liability to be sued on an implied assumpsit.]—11. The 43rd clause of the District Council Act, 4 & 5 Vic. ch. 10, does not subject a district council to be sued upon an *implied assumpsit* by reason of any transaction that may have occurred between the plaintiffs and the justices in Quarter Sessions, or the treasurer of the district before the existence of the council. *Low et al. v. Ottawa District Council*, iv. U. C. R. 194.

New treasurer—Mandamus to old treasurer for books &c.—Validity of election.]—12. At a session in October 1846 A. was elected by the District Council of the Midland district, treasurer of the district. When elected, A. was *himself a district councillor*; B. at the time of A.'s election was holding the same office of treasurer of the district, having been long previously appointed to that office by royal commission. A. upon his election requested B. to give him the books &c. of the office; B. refused, upon the grounds that under the District Council Acts, 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, A. had been elected treasurer at a time when by law no such election could take place, and that the two offices of district councillor and treasurer were incompatible. Upon B.'s refusal, A. applied to the Court for a mandamus to B. to deliver over the books

&c. *Held*—1st, that A. had been elected at the proper time and session; 2ndly, that the two offices were compatible; 3rdly, that A. was ineligible for election, the council having no power to receive his resignation as councillor; 4thly, that notwithstanding A.'s irregular election, he as treasurer de facto, under the act 9 Vic. ch. 40, had a legal right to the books &c. of his office, and that a mandamus might go to B. for the delivery of the books &c. to A., he being since A.'s election under the act a mere stranger to that office. *Regina v. Smith*, iv. U. C. R. 322.

Election of councillor—Town clerk ex officio chairman of the meeting.]—13. At a township meeting for the election of township officers, the first duty of the meeting is to elect a district councillor, and the town clerk ex officio may preside as chairman of the meeting until such councillor be chosen. The Court therefore refused, upon an information in the nature of a quo warranto, to disturb the seat of a district councillor who had been elected by the meeting, though under protest at the time by some of the electors, because the town clerk had insisted upon acting ex officio as chairman. *Small ex rel. Walker v. Biggar*, iv. U. C. R. 497.

Clerk—His power to charge council.]—14. The clerk of a district council can only charge the council by such acts as are within the scope of his general authority, or by such as they directed before-hand, or sanctioned afterwards, either expressly or by availing themselves of such acts to their advantage. *Ramsay et al. v. The Western District Council*, iv. U. C. R. 374.

Contract for school books, unauthorized by statute.]—15. The district council have no power to authorise their clerk or agent, to make any contract for the purchase of books for their several common schools throughout the district, such a contract not being

necessary for the exercise of their corporate functions. *Ib.*

Warden—Salary—By-law.]—16. *Semble*: That under the acts 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, a salary may be granted the warden of a district council, as warden. *Semble also*: That his salary if granted must be by a by-law regularly passed, and not by a vote or resolution merely. *Regina v. The District Council of Gore*, v. U. C. R. 357.

Assessment rolls—Statute labor lists, by whom to be prepared and paid for.]—17. *Held*, that under the authority of 4 & 5 Vic. ch. 10, district councils may pass by-laws, providing that the assessment rolls and statute labor lists, formerly prepared by the clerk of the peace, shall in future be prepared by the clerks of the district councils, and that they be remunerated therefor. *Semble*, however, that the councils may, if they think proper, still allow these duties to be performed by the clerks of the peace, in which case they will be entitled to the compensation. *Baby v. Baby*, v. U. C. R. 510.

[See the recent statute 13 & 14 Vic. ch. 67.]

Liability of council for not keeping steps of district court house in repair.]—18. Under the provincial statute 10 & 11 Vic. ch. 6, a district council cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the court house steps, which had been allowed to fall into an unsafe and dangerous situation. The council was charged in this declaration as having the court house under their control, and as bound by law to keep it in repair, and judgment was arrested on this averment, as the act 4 & 5 Vic. ch. 10, sec. 46, throws the responsibility of keeping the court house in a proper state of repair on the district surveyor, upon whose report, in the first instance, as to the necessity of the repair and the expense, the council have to pass a by-law. *Hawkshaw v. The District*

Council of the District of Dalhousie, vii. U. C. R. 590.

Quære: Would the council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted? *Ib.*

DISTRICT (NOW COUNTY) COUNCILLOR.

See DISTRICT COUNCIL, 12.—MANDAMUS, 15.—QUO WARRANTO, 2.

DISTRICT (NOW COUNTY) COURT.

See AMENDMENT, III. 7, 8.—APPEAL, 2, 3, 4, 5.—ARREST, III. 6.—ATTORNEY, III. 12; IV. 3.—CERTIORARI, 1, 2, 3, 6.—COSTS, I.—ESCAPE, 10.—INDEMNITY BOND, 9. JUDGMENT, 15, 18.—SHERIFF'S SALE, 11, 12.—WRITS OF TRIAL.

Arrest.]—1. Where a judge's order is necessary to hold to bail, an arrest cannot be made in a district court. *Ferris v. Dyer et al.*, Hil. Term, 6 Wm. IV., and *Smith v. Jarvis*, Hil. Term, 3 Vic.

8 Vic. ch. 13, sec. 44.]—2. The provision in the 8 Vic. ch. 13, sec. 44, allowing executions to issue in a district other than that in which judgment was rendered, is retrospective as well as prospective. *Easter et al. v. Longchamp et al.*, iii. U. C. R. 475.

[It is now no longer necessary to file an exemplification of the judgment, as directed by this section, the execution, under 13 & 14 Vic. ch. 52, sec. 3, may be issued to any county of Upper Canada, as of course.]

Replevin—Jurisdiction—Plea of non tenuit.]—3. The plea of non tenuit to an action of replevin, does not necessarily oust the district courts of their jurisdiction. The mere fact of the plaintiff in his declaration in replevin stating the value of the goods distrained at a higher sum than 15*l.*,

does not shew that the action could not have been brought in a district court. The plaintiff, to entitle himself to Queen's Bench costs, must prove at the trial that the goods are really of greater value. (Macaulay, J., dissentiente upon this last point.) *Wheeler v. Sime et al.*, iii. U. C. R. 265.

[Also, see 14, *infra*.]

When replevin maintainable in district courts.]—4. The Replevin Act of this province, 4 Wm. IV. ch. 7, gives jurisdiction to the district courts only in cases of seizure for distress. *Foster v. Miller*, v. U. C. R. 509.

[See the new Replevin Act, 14 & 15 Vic. ch. 64.]

Jurisdiction over evidence given in division court.]—5. The jury in a district court cannot try, as an issue of fact, whether the division court gave judgment on insufficient evidence, nor whether the plaintiff abandoned the residue of a large demand, so as to give the court jurisdiction; where therefore this has been done, and the judge of a district court, on a motion in term, arrested the judgment, the Court above confirmed his judgment. *Hynes v. Burrowes*, v. U. C. R. 253.

Jurisdiction in matters of set-off.]—6. Where there are open running accounts between the plaintiff and the defendant in a district court, made up of divisible items, not exceeding in each 25*l.*, the defendant can only recover by way of set-off the difference between 25*l.* and the amount due to the plaintiff. If the defendant, however, desire to recover more than will balance the plaintiff's demand, he must give notice of, or plead a set-off to the 25*l.*, and claim in his plea or notice to have the amount between the plaintiff's demand and the 25*l.* allowed to him. (McLean, J., dissentiente, being of opinion, that a defendant upon a set-off might recover a balance to any amount beyond the 25*l.*, the jurisdiction of the district courts not being

limited to a defendant's set-off.) *Russell v. Conway*, v. U. C. R. 256.

[The county court jurisdiction has, under 12 & 13 Vic. ch. 52, sec. 1, been extended to 50*l.* in actions of debt, covenant, or contract.]

Bail bond—When plaintiff in original action should sue.—7. In an action upon a bail bond given in a district court, the plaintiff, if the plaintiff in the original action, should sue in the district court; and if he sue in the Queen's Bench, the defendant may take advantage of the error in one of three ways—either by applying to the Court to set aside the proceedings, or by pleading in abatement to the jurisdiction, or by demurring generally to the declaration—he cannot have a repleader. *Hamilton v. Shears et al.*, v. U. C. R. 309.

Sheriff may sue on such bond in Queen's Bench.—8. *Semble*: That the sheriff, if suing on the bond, is not restricted to the district court of the district in which the bond was taken, but may sue in the Court of Queen's Bench. *Ib.*

Jurisdiction in actions of covenant.—9. *Held*, that under the District Court Act, 8 Vic. ch. 13, sec. 5, the district courts have jurisdiction in actions on covenant to pay a sum certain to 50*l.*, as in other cases of contract, where the amount is ascertained by the signature of the party. *Billings v. Nicolls*, v. U. C. R. 622.

[Since the above decision, the jurisdiction of the county court in matters of contract, where the amount is ascertained by the signature of the party to be charged therewith, has been extended to 100*l.*]

Recognizance.—10. *Semble*: That a recognizance taken in a district court may be sued on in the Queen's Bench. *Cockrane v. Ere et al.*, vi. U. C. R. 389.

Filing of recognizance taken in open court.—11. Where a recognizance has been taken in open court before the judge of the district court, and it is so averred: *Held*, that under

the 8 Vic. ch. 13, secs. 20, 23 and 50, the filing of the recognizance in the office of the clerk is not necessary to perfect it. *Ib.*

Jurisdiction in case for a false return to a fi. fa.—12. The district courts, under the statute 8 Vic. ch. 13, sec. 5, have no jurisdiction in an action on the case for a false return to a writ of fi. fa. *Bell v. Jarvis*, vi. U. C. R. 423.

Jurisdiction, if the title to land be brought in question.—13. Where in matters of tort relating to personal chattels the question of the title of the land shall be brought in question, though incidentally, the judge of the county court has no jurisdiction under 8 Vic. ch. 13, sec. 5, *Trainor v. Holcombe*, vii. U. C. R. 548.

Jurisdiction in replevin.—14. To an action against a sheriff for taking an insufficient replevin bond, he pleaded that the goods replevied were worth no more than 15*l.*, and that so, the writ of replevin being sued out of the county court was void: *Held*, plea bad. *Kirkendall v. Thomas*, vii. U. C. R. 30.

Recovery within district court jurisdiction—Judgment.—15. Where a plaintiff has special counts in his declaration, but abandons them, and recovers upon counts within the competence of a district court—the Court of Queen's Bench will order judgment to be entered on those counts only. *Wentworth v. Hughes*, Tay. U. C. R. 232.

DISTRICT (NOW COUNTY) COURT JUDGE.

See ATTACHMENT, I. 2.

DISTRICT (NOW COUNTY) TREASURER.

See DISTRICT COUNCIL, 8, 11.—DIVISION COURT, 4.

DISTRICT (NOW COUNTY) WARDEN.

See DISTRICT COUNCIL, 16.

DISTRINGAS.

See JURY, 3.

This writ is not the proper process with which a suit against a corporation should be commenced. *Cooper v. The Canada Company*, Dra. Rep. 198.

DIVISION COURT.

See DISTRICT COURT, 5.—JUDGMENT, 18.—NOTICE OF ACTION, 1.

School assessment.—1. A township collector may sue for the amount of an assessment for common schools, under 4 & 5 Vic. ch. 48, sec 10, in a division court. *McGregor v. White*, i. U. C. R. 15.

Notice of action—Want of notice must be pleaded.—2. The want of notice of action in a suit against a bailiff of a division court, acting in the office under 4 & 5 Vic. ch. 3, must be pleaded, and cannot be given in evidence under the general issue. But where under that act a bailiff, seizing and selling goods under an execution, is entitled to notice, the plaintiff in the execution is not, as he is not within the protection of the 6th clause, as a "person acting in the execution of the act." *Timon v. Stubbs et al.*, i. U. C. R. 347.

Liability of bailiff.—3. Held, that the bailiff, who made a seizure under an execution issued on a judgment by the judge of a district court under the Division Court Act, was not liable, though it was necessary that his defence should be pleaded specially, as there was no privilege of giving the special matter in evidence under the general issue, under that act or the 1 Vic. ch. 16; but *quære*, whether he

does not come within the provisions of the English statute 21 Jac. I. ch. 12? *Davis v. Moore et al.*, ii. U. C. R. 180.

Action by treasurer of district against clerk of—Declaration.—4. In an action by a treasurer of a district, under the Division Court Act, against the clerk of a division court for not paying over monies received by him, it is sufficient to declare in the treasurer's own name for money had and received by the defendant to the use of the plaintiff for the purposes of the act. *Howard v. Walton*, ii. U. C. R. 266.

Liabilities of clerk's sureties for monies not paid over.—5. The sureties of the clerk of a division court, having entered into the bonds authorized by the statutes 4 & 5 Vic. ch. 3, and 8 Vic. ch. 37, are liable upon such bond to the Crown for monies collected by the clerk for suitors in the court and not paid over. *Regina v. Patton*, *Regina v. McCullough*, and *Regina v. Moran*, vii. U. C. R. 83.

What damages Crown entitled to.—6. *Semble*: That on trial of any such action, the Crown would be entitled to a verdict for the penalty of the bond, and not merely for the sum received for the suitor and not paid over. *Ib.*

DOCUMENTS.

I. PRODUCTION OF, ON TRIAL.

See BOND, II. 10.

II. PROOF OF, GENERALLY.

See EVIDENCE, II.; IV. 2, 4.

DOGS.

See TORONTO (CITY OF), 2.

DONATIO MORTIS CAUSA.

See TROVER, I. 8.

DOWER.

See COVENANT, I. 1, 2, 3.

- I. RIGHT, AND HOW BARRED.
- II. PROCEEDINGS.
- III. DAMAGES.

I. RIGHT, AND HOW BARRED.

See ESTATE, 11.—INFANT, 3.

Conveyance by nominee of the Crown, being unmarried—Second deed after patent, being married.]—

1. Where a nominee of lands of the Crown, before letters patent issued for the lands, sold and conveyed them away, being at that time unmarried, and afterwards, having obtained the letters patent, made a new conveyance to the same party, being then married: *Held*, that after his death, his wife could not claim dower in the land, as she was estopped by the deed made before the letters patent issued. *McLean v. Laidlaw*, ii. U. C. R. 222.

*Wife's right in land exchanged.]—*2. A wife cannot be endowed of land given in exchange, and also of land taken in exchange, but she has her election to take one or the other. *McClellan et Ux. v. Meggatt et al.*, vii. U. C. R. 554.

*Not barred by sheriff's sale.]—*3. The dower of a wife is not barred by the sale in execution of her husband's estate. *Walker v. Powers*, Mich. Term, 4 Vic.

II. PROCEEDINGS.

See ARREST OF JUDGMENT, 9.

1. Proceedings in dower cannot be taken in an outer district. *Amiot et Ux. v. Woodcock*, ii. U. C. R. 119.

*Action against mortgagee in possession.]—*2. An action for dower may be maintained against a mortgagee in fee in possession. *Walker v. Boulton*, Mich. Term, 7 Vic.

*Style of parties in suit.]—*3. It is irregular in an action of dower to style the parties in the cause demandant

and respondent, and affidavits so intitled cannot be read. *Ferguson v. Malone*, i. U. C. R. 519.

*Action limited in point of time.]—*4. Our statute 4 Wm. IV. ch. 1, makes the remedy for dower subject to limitation in point of time.—The right of dower commences with the death of the husband, and the action must be brought within twenty years from that time. *German v. Grooms*, vi. U. C. R. 414.

*Statute of Limitations—When it commences.]—*5. The right of dower being only an inchoate right during the lifetime of the husband, the Statute of Limitations does not begin to run till the husband's death. *McClellan et Ux. v. Meggatt et al.*, vii. U. C. R. 31.

*Evidence to support action.]—*6. On the plea of ne unques accouple, evidence of cohabitation and reputation of marriage will be sufficient in dower; it is not necessary to prove the marriage by persons who were present at the ceremony. *Stoner v. Walton*, Mich. Term, 5 Vic.

[Upheld in *Phipps v. Moore*, v. U. C. R. 16.]

*Plea of ne unques seizie—Evidence.]—*7. Under the plea of ne unques seizie, possession by the husband is prima facie evidence of a seizin in fee. *Lockman v. Nesse*, Easter Term, 7 Wm. IV.

[See also case 16, *infra*.]

*Plea of alien ne—Replication.]—*8. In dower, the plea of alien ne may be pleaded in bar; and a replication thereto need not state a venue to the place of birth within the allegiance, nor state of what parent, nor when the demandant was born. *Robinet v. Lewis*, Dra. Rep. 46.

*Original process.]—*9. A writ of capias ad respondendum is not the first or original process in dower. *Phelan v. Phelan*, Dra. Rep. 398.

[See note (a), *infra*.]

*Plea of non tenure—Devise of lands in lieu of dower, how pleaded.]—*10.

In dower, a plea of no tenure is not necessarily a plea in abatement, and it may be pleaded either to part or the whole of the lands demanded; and where a plea states that the husband devised certain lands to the demandant in bar and satisfaction of dower, and that she agreed to the devise, it is sufficient without setting out the words of the devise; *aliter*, where the devise is not in express terms in bar of dower. *Breakenridge v. King*, iv. O. S. 180.

Service of grand cape.—11. In dower unde nihil habet, the writ of grand cape must be served fifteen days before the return. *Richardson v. Fraser et Ux.*, Hil. Term, 6 Wm. IV.

[See note (a), *infra*.]

Service of summons.—12. It is not necessary to serve the summons in dower on the tenant upon the premises. *Honsburg v. Fritz*, Hil. Term, 6 Wm. IV.

13. The writ of summons in dower must be served fourteen days before the return day. *Fulmer et Ux. v. Dougan*, i. U. C. R. 402.

Proclamations under 31 Eliz. ch. 3.—14. If a writ of dower be served, no proclamations are necessary under 31 Eliz. ch. 3. *Bissonet et Ux. v. Radenhurst*, Mich. Term, 1 Vic.

Casting an essoign.—15. In dower, the tenant cannot cast an essoign himself, by an entry made in his own name, but it must be made by some third party. *Henderson v. Stephens et al.*, ii. U. C. R. 64.

Evidence under issue of ne unques seizie.—16. Held, that under a plea to an action of dower that the husband was not seized of the lands, the demandant could not be allowed to recover, on merely giving evidence that the husband had been in possession of the estate, without proving his title. *Johnson et Ux. v. McGill*, vi. U. C. R. 194.

Issue of non tenuit—When plaintiffs entitled to succeed on.—17.

Semble: That where the evidence shews that the plaintiffs, in an action of dower, could have assigned dower, which would be binding upon themselves, they are entitled to succeed upon the issue of non tenuerunt, without any reference to the comparative goodness of their title. *McClellan et Ux. v. Meggatt et al.*, vi. U. C. R. 551.

[(a) The statute 13 & 14 Vic. ch. 58, sec. 1, enacts, that henceforth actions of dower shall be commenced by filing a *declaration or plaint* in the form heretofore used.]

III. DAMAGES.

Execution for damages set aside—Damages not being claimed.—1. A writ of execution for damages and costs in dower was set aside, damages being neither claimed in the declaration nor awarded in the judgment. *Davis v. McNab*, Trin. Term, 4 & 5 Vic.

When damages recoverable.—2. In dower, the demandant is entitled to damages only when her husband died seized. *Lockman v. Nesse*, Easter Term, 7 Wm. IV.; *Dayton v. Auldjo*, Easter Term, 4 Vic.; *Walker v. Boulton*, Mich. Term, 4 Vic.

Costs—3. Nor are costs recoverable unless the husband died seized. *Dayton v. Auldjo*, Easter Term, 7 Vic.

[See note (b), *infra*.]

Suggestion of seizin after final judgment—Damages.—4. In dower, a suggestion may be entered after final judgment that the husband died seized of lands, and inquiry shall go concerning the damages since the death, although the tenant be the alienee of the heir. *Robinet v. Lewis*, Dra. Rep. 239.

Mode of estimating damages.—5. After judgment of seizin in dower on a writ of inquiry, the mesne value of the premises, between the death of the husband and the obtaining judgment, should be assessed. Deman-

dant may also assess, as damages, her taxable costs in obtaining judgment of seizin, executing the writ of hab. fac. sezinam, and her necessary travelling expenses incurred in prosecuting her suit. *Robinet v. Lewis*, Dra. Rep. 272.

Evidence in mitigation.—6. Demandant's residence on the premises, in the family and at the expense of the heir-at-law for part of the time between the death of her husband and her recovering judgment, is not admissible in evidence as a set-off to her damages for the detention, though proper to go to the jury in mitigation. *Ib.*

Motion to increase damages made two terms after trial, no point being reserved.—7. The Court refused to entertain a motion to increase damages in dower, where no point had been reserved, and where the motion was not made until the second term after the assizes at which the cause was tried. *Watson v. Terwilliger*, i. U. C. R. 21.

[13 & 14 Vic. ch. 58, sec. 2, allows costs in all cases, whether damages be recoverable or not, if certain stipulations in that section be observed.]

DUPLICATE FIERI FACIAS.

See FIERI FACIAS, 10.

DUPLICITY IN PLEADING.

See PLEADING, VI.

DURESS.

Trover for goods given by plaintiff to defendant whilst under duress—Verdict for defendant—New trial granted.—Where in an action of trover, it was apparent that the goods for which the action was brought were transferred by the plaintiff to the defendant when under duress, and the jury found a verdict for the defendant

against the justice of the case,—the Court granted a new trial. *Stewart v. Byrne*, Easter Term, 4 Vic.

EASEMENT.

See WAY.

Prescription—Time.—1. A private right of way cannot be claimed by prescription in a less period than twenty years. *Smith v. Smith*, iii. O. S. 215.

Can only be granted by deed.—2. An easement can only be granted by deed, and if given by parol, may be revoked at any time. *Crysler v. Creighton*, Easter Term, 2 Vic.

[Even although money be paid for it and not returned. *Wood v. Leadbitter*, xiii. M. & W. 838.]

Mill dam—Waste water—Absolute and qualified easements.—3. A. at a time when no one else had a mill lower down the stream, made a dam across the river where it issued from a pond or lake, and kept back the water for the purposes of a mill which he had erected below the dam. After A.'s dam and mill had been thus erected, B. built a mill lower down the stream, which for twenty years or more had been adequately supplied with water by the escape of water from A.'s dam. As A. had in addition to his mill below his dam, a saw mill below B.'s mill, B. had rarely to complain of the water being injuriously retained by A.'s dam, and made therefore no objection to A.'s obstruction of the water by his dam for twenty years. After forty years and more had elapsed, A.'s saw-mill passed into other hands, and A.'s mill from decay stopped working. A. therefore having no object of his own in allowing the water to escape from his dam, kept it penned back and thus prevented B. from working his mill below. Upon this, B. at once brought an action on the case against A. for obstructing the flow of water to his mill by the erection of his

dam. A. pleaded an easement, and contended that as he had had the unrestricted control of the dam for twenty years, he might exercise the right whenever he pleased of preventing any water escaping to B.'s mill: but *held*, that the only easement acquired by A. under these facts, was the *qualified* one of penning back the water for the purpose of his own mill, so as not to interfere with B.'s use of the waste water, as he had been enjoying it for the work of his (B.'s) mill during the twenty years the dam had been erected by A. and acquiesced in by B. In other words, that A. could not set up a more extended right than he had actually been enjoying with B.'s consent for twenty years. *Held also*, that the fact of B. having paid A. a sum of money for one year or more to be allowed to enter upon A.'s land and let down the water to his, (B.'s) mill, was no concession by B. of any exclusive right on the part of A. to pen back the water at his dam as he pleased. *Buell v. Read*, v. U. C. R. 546.

[The enjoyment of an easement during twenty years must also be *continuous* and *uninterrupted*. *Onley v. Gardiner*, iv. M. & W. 496; *Bright v. Walker*, i. C. M. & R. 211.]

Right of a party whose land is overflowed to dig sluices.]—4. A. sues B. in an action on the case for injury to his mill by diverting the water of a stream at a point above; B. pleads in justification, that A. had erected a dam which penned back the water and made it overflow on the defendant's close, wherefore the defendant dug trenches into the stream to lead off the water, as he had a right to do. *Held* bad on demurrer. *Adamson v. McNab*, v. U. C. R. 438.

Twenty years' user—The right it gives—Excess in the user.]—5. The right which a party has acquired by twenty years' uninterrupted user to pen back the water of a stream in certain quantities for the purposes of his mill, will be strictly confined to the right as *actually exercised*; and any subsequent

excess beyond the twenty years' enjoyment of such right, if injurious to others, will render the party liable to an action. *McNab v. Adamson*, vi. U. C. R. 100.

How far a right of party whose land is overflowed to dig sluices is a justification for diverting the water.]

—6. A. a riparian proprietor below the stream pens the water back upon a proprietor B. above, so as to overflow at certain seasons B.'s land, upon which B. sues A. and recovers damages; B. then digs sluices close to the side of the stream, which have the effect of diverting the water in large quantities (much greater than that penned back by A.'s dam,) from the natural bed of the stream and past A.'s mill.—A. sues B.—B. justifies the diversion of the water, contending that his sluices became necessary to remove the injury caused by A.'s dam and his raising the water thereby. *Held per Cur.*, such justification no defence under any state of pleading—certainly not under the general issue, which was the only plea in this case. Macaulay, J. dissentiente, who was of opinion that a new trial should be granted for misdirection, on the ground that the diversion of the water having been occasioned by the *combined act* of both the plaintiff and the defendant—viz: by the dam of the plaintiff and by the sluices of the defendant—not being merely a question of damages but a good defence to the action and admissible under the general issue, should have been left at the trial as a question of fact for the jury. *Adamson v. McNab*, vi. U. C. R. 113.

EJECTMENT.

- I. DEMAND OF POSSESSION, AND NOTICE TO QUIT.
- II. DECLARATION, NOTICE TO APPEAR, AND RULE FOR JUDGMENT
- III. SERVICE.

IV. CONSENT RULE.

(1), *Consent rule generally.*(2), *Attachment for non-payment of costs.*

V. SETTING ASIDE PROCEEDINGS.

VI. STAYING PROCEEDINGS TILL COSTS OF FORMER EJECTMENT PAID.

VII. JUDGMENT.

VIII. OTHER MATTERS.

I. DEMAND OF POSSESSION, AND NOTICE TO QUIT.

See LANDLORD AND TENANT, I. 2;

II. 1.—LEASE, I. 4.—MORTGAGE, 9.

Particularity requisite in demand or notice.—1. It is necessary in a demand of possession to observe particularity in pointing the defendant to the precise parcel of land the plaintiff is seeking to recover. See *Doe dem. Jeffrey v. Williams*, vi. U. C. R. 160.

Disclaimer by tenant.—2. Where the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his title: *Held*, that he was neither entitled to a notice to quit nor a demand of possession. *Doe dem. Bouter v. Fraser et al.*, iv. O. S. 80.

Mortgagor's lessee.—Ejectment by mortgagee.—3. Where in ejectment by a mortgagee the tenant claimed possession under a lease from the mortgagor, and refused to attorn to the mortgagee (who demanded possession,) and shewed no lease, nor any certain holding: *Held*, that he was not entitled to a notice to quit. *Doe dem. Samson v. Parker*, iv. O. S. 36.

Action by lessee against party in possession, with his consent.—4. Where the lessor of the plaintiff having been seized in fee of the land in question, conveyed it in fee to the defendant and took back a lease for life at a nominal rent, and the defendant went into possession and so continued for several years with the lessor's

knowledge, but without his express consent: *Held*, that he could not be treated as a trespasser and ejected without a demand of possession. *Doe dem. Mann v. Keith*, iv. O. S. 86.

Action by heir against assignee of ancestor's obligee.—5. No demand of possession is necessary before an ejectment brought by an heir, where a party having a bond for a deed from the ancestor enters into possession and afterwards assigns his interest and possession to the defendant. *Doe dem. Lemoine v. Vancott*, Hil. Term, 7 Wm. IV.

Action by grantee of the Crown against locatee.—6. A person holding land under a license of occupation from the Crown, is entitled to a demand of possession before ejectment brought by a grantee of the Crown in fee. *Doe dem. Creen v. Friesman*, Trin. Term, 1 & 2 Vic.

Demand of possession by a party who subsequently sells.—Such demand not available to his vendee.—7. A demand of possession made by a person who afterwards assigned his interest to the lessor of the plaintiff, cannot be available by the lessor so as to make the tenant's holding tortious as to him. *Ib.*, Easter Term, 2 Vic.

Evidence of disclaimer to obviate necessity for notice.—8. The assertion of title by a tenant before, coupled with a refusal to pay rent after action brought, is sufficient evidence of a disclaimer to obviate the necessity of proof of a notice to quit, especially where the tenant attempts to rely on such title at the trial. *Doe dem. Cuthbertson v. Sager et al.*, Easter Term, 4 Vic.

9. A tenant endeavoring to defend his possession by a title adverse to the lessor of the plaintiff, is not entitled to a notice to quit. *Doe dem. Graham v. Edmondson*, i. U. C. R. 265.

Over-holding tenant refusing to pay rent.—10. Where a tenant over-

holds for a considerable time, and the landlord asks him to pay rent, and he refuses to do so, he may be ejected without a notice to quit or a demand of possession. *Doe dem. Burritt v. Dunham*, iv. U. C. R. 99.

Tenant taking lease from a stranger.]—11. Where a tenant takes a lease from a stranger, and undertakes to pay him rent, it is unnecessary for the lessor of the plaintiff, his original landlord, to serve him with a notice to quit or demand of possession before ejectment. *Doe dem. Daniels v. Weese*, v. U. C. R. 589.

Tenant asserting his right to fee.]—12. Where possession is demanded from a defendant in ejectment, and he, instead of claiming to be a tenant, asserts his right to the fee, he has no claim to a notice to quit as a tenant. *Doe dem. McKenzie et al. v. Fairman*, vii. U. C. R. 411.

[See also, FORFEITURE, 1, 2, 3.]

Action by heir of a feme covert who signed the deed without the requisite acknowledgment.]—13. It is not necessary for an heir to demand possession from a person claiming the land as the grantee of the ancestor, who was a feme covert, and executed the deed under which the defendant claims with her husband without the acknowledgment required by 59 Geo. III. ch. 3, such deed being as to her absolutely void. *Doe dem. Vansickler v. Fairwell*, Mich. Term, 4 Vic.

Demand of possession subsequently confirmed by person having the title.]—14. A demand of possession by a person whose authority is afterwards recognized by the person having title, is sufficient. *Doe dem. Creen v. Friesman*, Hil. Term, 4 Vic.

Trespasser who has made improvements with the knowledge of the owner.]—15. Where a person has been in the possession of land for many years, and made valuable improvements thereon, under the eye of the owner, his consent to the occupation

may be presumed, and the possessor cannot be treated as a trespasser, and ejected without a demand of possession. *Doe dem. Sheriff v. McGilliveray*, Mich. Term, 5 Vic.

Tenancy from year to year—Agreement for lease never executed.]—16. Where a tenancy from year to year exists, and during its continuance the parties agree for a lease for a certain term, with a power to the tenant to purchase, which is never executed, the tenant stands in his original situation after the agreement fails, and cannot be ejected without a regular notice to quit. *Doe dem. Crookshank v. Crookshank*, Mich. Term, 5 Vic.

Agreement for purchase—Action after default.]—17. Where the defendant entered into land under an agreement to purchase, with a covenant that he should enjoy until default made in the payment of any part of the purchase money, which was payable in instalments: *Held*, that on making default, he might be ejected without any notice to quit, or demand of possession. *Doe dem. Sheriff v. McGilliveray*, Hil. Term, 5 Vic.

Sufficiency of demand.]—18. Where the defendant contracted for the purchase of land, and gave his bond and promissory notes for the payment of the money by instalments, but did not pay any of them, and his vendor afterwards sold to the lessor of the plaintiff, who demands possession at the defendant's dwelling house in his absence, in the presence of several members of the family: *Held*, that if a demand of possession were necessary at all, the demand proved was sufficient, as it did not appear that the defendant was not aware that it had been made. *Doe dem. Sherwood v. Stephens*, Trin. Term, 5 & 6 Vic.

Tenancy at will—Action by heir of owner.]—19. Where a person enters into the possession of land under an agreement to purchase it, he is a tenant at will to the seller, and at the

seller's death his heir-at-law can maintain ejectment against him, without any notice to quit or demand of possession. *Doe dem. Kemp v. Garner*, i. U. C. R. 39.

[See case 22, *infra*.]

Defendant setting up two independent defences.—20. Where at the trial a defendant in ejectment endeavors to make title in himself as the owner of the fee and fails, he is precluded from defending himself upon the ground of want of notice to quit or demand of possession. *Doe dem. King's College v. Graham*, i. U. C. R. 158.

21. A defendant in ejectment cannot first put the plaintiff to proof of his title, and then, failing in his defence, secondly, claim a right to notice or a demand, as if he were in possession under him. He must decide whether he will claim adversely to, or in privity with the title—he cannot do both. *Doe dem. Maitland v. Dillabough*, v. U. C. R. 214.

[See div. VIII. 8, *infra*.]

Agreement to purchase—Tenancy at will.—22. Where a defendant was in possession of land under an agreement to purchase, the purchase money being payable by instalments, and after the payment of the first instalment, failed in the payment of any of the others, but remained in possession for many years, until the lessor of the plaintiff offered to give him a deed on certain terms, which were not complied with, and told him he might remain in possession for the summer if he would leave the land in the autumn, which the defendant refused: *Held*, that the jury having found that the lessor of the plaintiff had at this time determined the holding at will, the defendant was not entitled to a demand of possession. *Doe dem. Stodders v. Trotter*, i. U. C. R. 310.

Agreement to give up possession—Action.—23. Where the defendant had gone into possession of land under

a demise for four years, which was void under the Statute of Frauds, and before the expiration of the first year, the lessor of the plaintiff told him that he should want the land in the spring, and the defendant agreed to give it up then: *Held*, that under these circumstances, there was no necessity for proving a formal notice to quit. *Doe dem. Lynde v. Merritt*, ii. U. C. R. 410.

Vendor continuing in possession after sale.—24. The mere fact of a vendor continuing in possession of land, without more being shewn, does not entitle him to a demand of possession before bringing ejectment. *Doe dem. Richardson v. Dafoe*, iv. U. C. R. 484.

Agreement to purchase—Default—Action against defaulter's assignee.—25. A. contracts to sell to B. certain land for a sum of money, to be paid by annual instalments, and the defendant went into possession under B., upon some understanding or condition, not explained at the trial—default was made in the payments to A.: *Held*, that A. could bring ejectment against the defendant without notice or demand of possession. *Doe dem. Phillpotts et al. v. Crouch et al.*, v. U. C. R. 453.

Sub-lease by government lessee—Action by such lessee after grant to him in fee.—26. A. had a lease from the government of a clergy reserve for twenty-one years, ending in 1837.—A. sub-let to B.—In 1843, after the term had expired, A. obtained a patent in fee from the Crown and finding B. still in possession, he brought an action of ejectment against him: *Held*, that under these facts, A. was not entitled to notice to quit, or demand of possession. *Doe dem. Wismer v. Hearn*, vi. U. C. R. 193.

Disclaimer by tenant—Effect on his tenancy.—27. The effect of a disclaimer by a tenant of his landlord's title, is at once to put an end to an existing tenancy, and ejectment may be

maintained without a notice to quit, and without waiting until the period when the tenancy will expire. *Doe dem. Claus v. Stewart*, i. U. C. R. 512.

II. DECLARATION, NOTICE TO APPEAR, AND RULE FOR JUDGMENT.

See AMENDMENT, II. 3, 8, 17, 18, 19, 20.—PRESBYTERIAN CHURCH, GALT. RELIGIOUS SOCIETIES, 3.

Tenants in common—Joint demise.—1. A joint demise by tenants in common in a declaration in ejectment, cannot be supported. *Doe dem. McNab et al. v. Seiker*, Mich. Term, 7 Wm. IV.; *Doe dem. Shuter et al. v. Carter*, Hil. Term, 2 Vic.

[See further, AMENDMENT, II. 17, 18.]

Joint tenants may sever.—2. Joint tenants in bringing ejectment may sever in their demise. *Doe dem. Barwick et al. v. Clement*, vii. U. C. R. 549.

Rule for Judgment.—3. Where the rule for judgment against the casual ejector, was moved in the second term after service of the declaration, a rule nisi returnable eight days after the service of the rule on the tenant, was granted for the tenant to appear, or otherwise judgment. *Goodtitle dem. Garten v. Roe*, Mich. Term, 1 Vic., and *Doe dem. Bond v. Roe*, Hil. Term, 1 Vic.

[Where the declaration was intituled in the Common Pleas, but the notice in the Queen's Bench, the Court, on objection being taken, refused to make absolute a rule for judgment, and ordered the defendant to enter an appearance. *Doe dem. Knowles v. Roe*, xii. M. & W. 569.]

Several demises—Rule.—4. Where there are several demises laid in the declaration, the rule for judgment against the casual ejector should be intituled "Doe, on the several demises of, &c." But it is not necessary to mention all the demises; it is sufficient to state "on the several demises of A. B. and others." *Doe dem. McDonald et al. v. Roe*, Hil. Term, 2 Vic.,

and *Doe dem. Street et al. v. Roy*, Mich. Term, 2 Vic.

General description in declaration.—5. Where the plaintiff declared generally, stating neither the concession nor lot, and the defendant defended for lot 23, and at the trial the plaintiff proved title to lot 22, which in the description appeared to include lot 23: *Held*, that the plaintiff was entitled to a general judgment, and that he must take possession of the right land at his peril. *Doe dem. Owen v. Curtis*, Mich. Term, 4 Vic.

Plaintiff's right to damages, when term laid in declaration expired.—6. When the term in a declaration in ejectment has expired, the plaintiff is entitled to recover nominal damages and his costs, although he cannot recover possession. *Doe dem. Lick v. Ausman*, Hil. Term, 6 Vic.

Notice to appear—Amendment.—7. Where in a country cause the tenant was called upon in the notice from the casual ejector to appear within the first four days of term, and he obtained a rule nisi to set aside service of the declaration for irregularity on that ground—the lessor of the plaintiff had leave to amend the notice by making it to appear of term generally, or within four days thereafter, on payment of costs. *Doe dem. Kemp v. Roe*, Mich. Term, 6 Vic., P. C. Jones, J.

Misnomer—Amendment.—8. Where the notice to appear in a declaration in ejectment was addressed to the tenant by the christian name of *James* instead of *William*, an amendment in the notice was allowed. *Doe dem. Crumbach v. Roe*, i. U. C. R. 518.

[See div. III. 10 infra.]

Demise by guardian.—9. A guardian appointed by the Vice Chancellor upon the petition of an infant, cannot make a demise for the purpose of trying the title to the infant's land in ejectment. The demise should be by the

infant. *Doe dem. Marianne v. Alexander*, i. U. C. R. 120.

Declaration—Certainty of description of land.—10. Where the declaration in an action of ejectment designates the property sought to be recovered by the lot and concession of a township, without mentioning the quality or description of land, the declaration is sufficiently certain *Doe dem. O'Reilly v. Pickle*, i. U. C. R. 282.

[See AMENDMENT, II. 3.]

Fee in wife—Husband's demise.—11. Though the wife own the fee, the husband may sustain ejectment on his own demise alone; but on such a demise, the lessor of the plaintiff must prove his marriage. *Doe dem. Peterson v. Cronk*, v. U. C. R. 136.

[See HUSBAND AND WIFE, 6.]

III. SERVICE.

See ATTORNEY, II(1), 6.—EJECTMENT, VIII, 5.

By whom to be made.—1. A declaration in ejectment cannot be served by the lessor of the plaintiff. *Doe dem. Armstrong v. Roe*, Trin. Term, 5 & 6 Wm. IV.

On person living in tenant's house.—2. Service of a declaration in ejectment on a person living in the tenant's house, is not sufficient, without shewing that it came to the tenant's knowledge. *Doe dem. Smith v. Roe*, Trin. Term, 6 & 7 Wm. IV.

On any other person other than tenant or wife.—3. Service of a declaration in ejectment upon any person but the tenant or his wife is insufficient, unless it can be shewn that the declaration came to the tenant's knowledge before the first day of the term. *Doe dem. Gray v. Roe*, Hil. Term, 7 Wm. IV.

[See a further case, 11 infra: Also, *Doe dem. Lord Denorben v. Roe*, ii. M. & W. 374, and *Doe dem. Read v. Roe*, i. M. & W. 633.]

Affidavit.—4. The usual rule for judgment against the casual ejector

was granted on an affidavit stating that the deponent, who served the declaration, read part of the notice to the tenant and explained the meaning of it, and that the tenant seemed to understand it. *Doe dem. McFarlane v. Roe*, Hil. Term, 7 Wm. IV.

On one of several tenants in common.—5. Service upon one of several tenants in common in possession of the same parcel of land, is sufficient. *Doe dem. Davison v. Roe*, Tay. U. C. R. 676.

[See div. VIII. 5 infra.]

Affidavit.—6. Where the affidavit of service of the declaration stated a service on the tenant in possession of part of the premises, a rule for judgment against the casual ejector was granted as to such part. *Doe dem. Davidson v. Roe*, Mich. Term, 1 Vic.

Affidavit.—7. Service of the declaration in ejectment on a person who is stated in the affidavit to have admitted himself to be tenant in possession, is not sufficient; he must be sworn to be tenant in possession. *Doe dem. Dunn v. Roe*, Easter Term, 2 Vic.

Affidavit.—8. An affidavit of the service of a declaration in ejectment on a person who represented herself to be the wife of the tenant is insufficient, unless it state the deponent's belief that she is so. *Doe dem. Sanderson v. Roe*, Trin. Term, 2 & 3 Vic.

Affidavit—Before whom to be sworn.—9. An affidavit of the service of a declaration in ejectment, cannot be sworn before the attorney in the cause. *Doe dem. Walker v. Roe*, Trin. Term, 2 & 3 Vic.

Alteration made in declaration with tenant's knowledge.—10. Where the notice to appear was for a wrong term, and it was struck out and the right term inserted in pencil, and the alteration pointed out to the tenant at the time of service—the Court refused to set aside the service for irregularity. *Doe dem. Mills v. Roe*, Hil. Term, 4 Vic., P. C. Jones, J.

On son of tenant.]—11. The service of a declaration in ejectment on the son of the tenant upon the premises will not be allowed, unless it can be shewn by affidavit that before the first day of the term the tenant had knowledge of such service. *Doe dem. Hunter et al. v. Roe*, iii. U. C. R. 127.

Affidavit.]—12. The affidavit of service of a declaration in ejectment, and notice upon the tenant must shew *the time* when the declaration &c. was served. *Doe dem. Sherwood v. Roe*, v. U. C. R. 319.

Contradictory affidavits.]—13. Where it was sworn that the declaration in ejectment was served upon the tenant in possession—the Court refused to set it aside upon an affidavit stating it to have been served upon a stranger or servant upon the premises. *Doe dem. Dunlop v. Roe*, Tay. U. C. R. 480.

IV. CONSENT RULE.

(1), *Consent rule generally.*

See divs. V. 2 ; VI. 6.

Declaration specifying lot—Consent rule general.]—1. The plaintiff set forth the particular lot he went for in his declaration, and the defendants entered into a general consent rule, not specifying the premises particularly ; the plaintiff, after passing the record on this rule, entered judgment by default, treating the consent rule as a nullity, and the Court set the judgment aside as irregular, and held the defendants' affidavit intituled as under the consent rule correct. *Doe dem. Thompson v. Putnam et al.*, iii. O. S. 312.

Confessing possession of premises.]—2. Where the lessor of the plaintiff claimed the land in question as part of one lot, and the tenant claimed it as part of another lot, the tenant was allowed to enter into the consent rule, without confessing possession of the

premises in the declaration. *Doe dem. Canada Company v. Roe*, ii. O. S. 209.

3. Where the lessor of the plaintiff and the tenant each claimed the land in dispute as part of a different lot—the Court refused to allow the defendant to enter into the consent rule without confessing possession, but directed him to defend, setting out the premises in the consent rule according to his description, and stating them to be the same premises which were claimed by the plaintiff in the declaration. *Doe dem. Ross v. Roe*, Mich. Term, 1 Vic.

[See case 5, *infra*]

Intituling of proceedings prior to.]—4. In ejectment, all the proceedings prior to entering into the consent rule must be intituled in the same cause against the casual ejector. *Doe dem. Sutton v. Ball*, i. U. C. R. 279.

Description of premises.]—5. Where the plaintiff in ejectment declared for lot 11 in the 4th concession of Sydney, and the defendant defended for lot 12 in the same concession, stating it in his consent rule to be the same premises mentioned in the declaration, and the plaintiff, treating it as a nullity, signed judgment against the casual ejector—the Court held the consent rule good, and set aside the judgment for irregularity. *Doe dem. Gillkison v. Shorey*, i. U. C. R. 341.

Amendment at Nisi Prius.]—6. A judge at Nisi Prius has no power to amend a consent rule in ejectment. *Doe dem. McQueen v. Voosburgh*, i. U. C. R. 349.

Amendment by defendant after verdict against him.]—7. Where it turns out that the defendant from inadvertence, has admitted himself in the consent rule to be in possession of some of the land to which the lessor of the plaintiff is clearly entitled, and so has had a verdict pass against him, the Court will grant a new trial on payment of costs, with leave to amend

the consent rule. *Doe dem. Sheldon v. Ramsay et al*, vii. U. C. R. 446.

(2), *Attachment for non-payment of costs.*

See div. VI. 2.

Execution against nominal plaintiff not necessary before attachment against lessor.]—1. It is not necessary that a fieri facias or capias ad satisfaciendum should issue against the nominal plaintiff in ejectment on a judgment for the defendant, before an attachment against the lessor of the plaintiff for non-payment of costs under the consent rule. *Doe dem. Impey v. Gray*, Hil. Term, 4 Vic., P. C. Jones, J.

Attachment, although imprisonment for debt abolished.]—2. Notwithstanding the act abolishing imprisonment for debt, an attachment may still issue for non-payment of costs in ejectment under the consent rule. *Doe dem. Dunmer v. Benton*, i. U. C. R. 157.

Granted against one of several lessors.]—3. An attachment for non-payment of costs under the consent rule in ejectment on the demise of several lessors, was granted against one of them, without any proof of demand or service upon the others. *Doe Cubitt et al. v. McLeod*, i. U. C. R. 394.

Attachment not an execution under 5 Wm. IV. ch. 3.]—4. An attachment for non-payment of costs pursuant to the consent rule in ejectment is not a writ of execution, and a party taken under it is not entitled to be discharged from custody as having been illegally arrested under 5 Wm. IV. ch. 3, sec. 2, which abolishes writs of execution issued on a judgment entered for costs only. *Regina v. Kelly*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

5. A defendant in custody on an attachment for non-payment of costs is not entitled to his discharge under 5 Wm. IV. ch. 3, sec. 2, in the same

manner as if he were in custody in execution for costs. *Wilson v. Dillingham*, Easter Term, 7 Vic.

Ejectment by parties as a corporation when not one—Nonsuit—Costs.]

—6. Where the lessors brought ejectment in a corporate name, to which they were not entitled, and so entered into the consent rule and were nonsuited at the trial: *Held*, that an attachment could not issue against them for non-payment of costs demanded of them individually. *Doe dem. Methodist Trustees v. Carwin*, Easter Term, 3 Vic.

V. SETTING ASIDE PROCEEDINGS.

See JUDGE (IN CHAMBERS), 1.—NEW TRIAL, X. 13.

Second ejectment—Disobedience to order for stay of proceedings till costs of first paid—Setting aside proceedings—Affidavit.]—1. In a second ejectment for the same premises, between the same parties, proceedings were stayed for non-payment of the costs of the first. The plaintiff proceeded, notwithstanding, and was nonsuited for the not confessing lease, entry and ouster. The affidavit on which the defendant moved to set aside the proceedings was so worded as to be evidently made in the first cause, but the Court overruled this exception and set aside the proceedings. *Doe dem. Lake v. Davis*, iii. O. S. 311.

Nonsuit set aside, consent rule being irregular.]—2. A nonsuit for not confessing lease, entry and ouster, and judgment and execution thereon, was set aside on payment of costs, on affidavits shewing that a common consent rule had inadvertently been entered into by the defendant when the circumstances of the case required a special one, and the defendant could not have made his defence on the consent rule filed. *Doe dem. Lasher v. Edgar*, Mich. Term, 6 Wm. IV.

Vacant possession—Judgment set aside on affidavits of premises not

being vacant..]—3. In ejectment on a vacant possession after the usual rule had been obtained by the plaintiff, the Court set the proceedings aside on affidavits stating that there was a house on the premises with several articles of furniture in it, and that the tenant lived near, on condition that the applicant who claimed the title as landlord, should appear and defend. *Popplewell dem. Capreol v. Abbott*, Hil. Term, 6 Wm. IV.

Several demises—Affidavit to set aside proceedings..]—4. In an ejectment on the several demises of the lessor in different representative characters, and also in his individual right, an affidavit to set aside proceedings intituled in the demises of his representative character alone, was held insufficient. *Doe dem. Street et al. v. Roy*, Easter Term, 3 Vic.

Judgment against casual ejector—Lapse of time..]—5. Where a tenant moved to set aside a judgment against the casual ejector on the ground of collusion between the lessor of the plaintiff and the tenant's wife, in the accepting service of the declaration—the Court refused to interfere, more than a year having elapsed since the execution of the writ of possession. *Doe dem. Gray v. Roe*, Hil. Term, 4 Vic., P. C. Jones, J.

[See case 10 *infra*, also JUDGE (IN CHAMBERS), 1.]

Possession contested on affidavits..]—6. The fact of the tenancy in an action of ejectment cannot be contested by affidavits, on a motion to set aside the service of the declaration and notice. *Semble*: That all the tenant can do is to ask the Court to excuse him from confessing possession, and to require the plaintiff to prove it. *Doe dem. Vancott et al. v. Roe*, v. U. C. R. 272.

Nonsuit for not confessing lease, entry, and ouster—Refusal to set aside, on the merits, &c..]—7. Where a defendant in ejectment, relying upon

some supposed irregularity, did not appear at the trial, and the plaintiff was nonsuited for want of confession of lease, entry, and ouster by the defendant, and the point of alleged irregularity was afterwards decided against the defendant,—the Court refused to set aside the nonsuit, and let him in to a trial on payment of costs, although he swore to the merits. *Doe dem. Leonard v. Myers*, i. U. C. R. 299.

Nonsuit—Setting aside for non-compliance with judge's order..]—8. Where in ejectment by a mortgagee against the mortgagor, a judge's order was obtained in vacation, staying proceedings in the cause until the first day of the following term, and the attorney of the lessor of the plaintiff proceeded to the trial of the cause notwithstanding the order, conceiving the judge had no power to make it, and the plaintiff was nonsuited at the trial because the defendant refused to confess lease, entry, and ouster,—the Court set aside the nonsuit for irregularity, with costs. *Doe dem. Ferguson v. McCarthy*, ii. U. C. R. 141.

Judgment against casual ejector set aside for collusion..]—9. Where judgment is obtained against the casual ejector in consequence of the tenant in possession having neglected to give notice to his landlord—the Court will set the judgment and writ of possession aside, and compel the tenant to pay costs. *Doe dem. Robertson v. Metcalf*, Tay. U. C. R. 518.

[See case 11, *infra*.]

10. Where the tenant in possession is shewn to have been acting in collusion with the lessor of the plaintiff in an action of ejectment, the Court will set aside the judgment against the casual ejector. *Doe dem. Henderson v. Roe*, iv. U. C. R. 366.

Costs on setting aside..]—11. The Court, though they will set aside the judgment, will not order the tenant in possession to pay the costs, but will

leave the landlord to his remedy under the statute 11 Geo. II. *Ib.*

VI. STAYING PROCEEDINGS TILL COSTS OF FORMER EJECTMENT PAID.

See div. V. 1.

When application to be made.]—1. Where a party fails in his first action of ejectment and then brings a second, the defendant cannot apply for payment of costs of the first ejectment till he has entered an appearance. *Doe dem. Flanders et al. v. Roe*, iii. U. C. R. 127.

Rule refused, lessor of the plaintiff being attached.]—2. Where the lessor of the plaintiff had been attached and was on the limits for non-payment of the costs of a former ejectment brought by him for the same premises, a rule to stay proceedings in the second action until the costs of the former one were paid was refused. *Doe dem. Stewart v. Roe*, Mich. Term, 1 Vic.

Second ejectment between same parties—Rule granted.]—3. In a second ejectment for the same premises between the same parties, proceedings were stayed for non-payment of the costs of the first. *Doe dem. Lake v. Davis*, iii. O. S. 311.

4. Proceedings will be stayed in ejectment until the costs of a former ejectment against the lessor for the same premises be paid. *Doe dem. Hussey v. Roe*, Easter Term, 3 Vic.

Second action by heir, first being by ancestor.]—5. In an action of ejectment by an heir, the Court refused to stay proceedings until the costs of a former action, brought for the same premises by the ancestor, had been paid, the ancestor having died before any legal determination of that suit. *Doe dem. McKay v. Roe*, Mich. Term, 5 Vic., P. C. Jones, J.

Rule granted, although plaintiff not joined in the consent rule.]—6. Where in ejectment the defendant appears and enters into the usual consent

rule, and obtains an order to stay proceedings until security for costs be given, and the lessor of the plaintiff subsequently serves new declarations, such subsequent proceedings will be stayed until the costs in the former suit be paid, even though the plaintiff had not joined in the consent rule. *Doe dem. Anderson v. Anderson*, i. U. C. R. 275.

VII. JUDGMENT.

See div. V. 3, 5, 9, 10.—JUDGMENT, 16, 17.

VIII. OTHER MATTERS.

See ALIEN, 5.—ARBITRATION AND AWARD, IV(3), 5, 9.—BINBROOK (TOWNSHIP OF).—CROWN GRANT, 16.—EVIDENCE, II. 4, 7; VII. 1.—HEIR, 2, 3.—HUSBAND AND WIFE, 6.—INFANT, 4.—LEASE, I. 5.—MORTGAGE, *passim*.—NONSUIT, 20. ONUS PROBANDI, 6.—RECORD, 7.—RECTOR.—SURVEY, 2, 3.—TAXES, 3, 4, 5, 12.—TENANCY IN COMMON, 2.—TITLE, 11, 12, 13, 14, 15.—WITNESS, 22, 25, 26.

Right of party entitled to possession to maintain, against party having the legal title.]—1. A. is let into possession of land by B., upon an agreement to purchase, with the understanding that he is to remain in possession until he makes default in the payment of his instalments. A. afterwards, without making any default, lets B. into possession, upon an express condition however, that he (B.) is to restore to him (A.) the possession if a certain state of things should occur. The event upon which A. is to regain possession under this agreement happens, B. nevertheless retains the possession, and A. brings his ejectment: *Held*, that under these facts, A. being entitled to the possession, could maintain his ejectment against B., though he had the legal title. *Doe dem. Barker et al. v. Crosby*, vii. U. C. R. 202.

Crown lease—Assignment thereof—Notice to produce—Secondary evidence of assignment—Ejectment by sheriff's vendee.—2. Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an unexpired Crown lease, sold as belonging to B. by assignment: *Held*, that after proof of an exemplification of the lease, the judgment, fieri facias, and sheriff's deed, a notice to produce the original lease and assignment, without specifying particulars or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B., and that as A. shewed no title, nor that he had ever been in possession, the same presumptions should be made in favor of the purchaser as if he had been left to contend with the debtor himself. *Doe dem. McGuire v. Dennis*, ii. O. S. 589.

Crown lease—Evidence of assignment when not in writing.—3. A lessee of the Crown verbally assigned his lease to B., who paid him for it and went into possession of the land mentioned in the lease, and after some years died in possession, having received the original lease from A. A. afterwards died, and the lessor of the plaintiff, his administrator, brought an action of ejectment against the defendant, B.'s administrator. At the trial the lessor of the plaintiff put in an exemplification of the original lease, and letters of administration, and the defendant having proved as above, and that after B.'s death the lease and other papers had been taken out of B.'s trunk, and the lessor of the plaintiff had since stated it was in his possession, and proof of notice to produce the lease, (which was not done), and the lessor of the plaintiff produced it after the defendant's case closed, and the jury found for the defendant: *Held*, on motion for a new trial, the jury were justified in presuming legal assignment of the lease under the cir-

cumstances. *Doe dem. Murphy et al. v. Mulholland*, ii. O. S. 115.

[See a case of ejectment brought on an assignment not under seal, 7 *infra*.]

Attachment against tenant for resuming possession.—4. In ejectment an attachment was refused against the original tenant, who resumed possession more than a year after execution executed. *Doe dem. Myers v. Roe*, Trin. Term, 3 & 4 Vic.

Action against several tenants of different apartments in one house.—5. Where several tenants occupied different apartments in one house, as several tenements: *Held*, that the single action of ejectment might be brought for the recovery of the premises, serving each tenant with a copy and notice. *Doe dem. Bell v. Roe*, iii. O. S. 64.

Fraud by an administrator on his intestate's vendee.—6. Where A. having only a bond for a deed, and not having paid all the purchase money, made a conveyance in fee to B. and died, and B. went into possession of the land and continued in possession for several years, when A.'s administrator obtained a conveyance in fee to himself from the person who had given A. the bond: *Held*, that the administrator by making use of the deed was guilty of a fraud, and that his title under it could not prevail against B. *Doe dem. Dobie v. Vanderlip*, Easter Term, 6 Wm. IV.

When ejectment maintainable on a parol assignment.—7. Ejectment cannot be maintained on a written assignment not under seal of all the tenant's right title and interest in the premises, it not being shewn that he had any, or if so, what his interest was. *Doe dem. Pringle v. Hodgson*, Easter Term, 3 Vic.

Several independent defences.—8. Where the lessor of the plaintiff endeavors at the trial to establish his title as devisee, and fails in that, he is not thereby precluded from insisting on his

right as heir-at-law, or as a purchaser from the person last seized in possession. *Doe dem. Hussey v. Gray*, Mich. Term, 6 Vic.

Sufficiency of evidence to require the production of an agreement.]—9. Where in ejectment against a person let into possession of land, a witness stated he had seen a written agreement about the land between the parties, but it was not shewn in whose custody it was or what its terms were, and it was proved the defendant had written a letter to the plaintiff's agent, stating that he was to give up the premises on a certain day—it was held that the lessor of the plaintiff could not be required to produce the agreement, as it was not sufficiently shewn to be in his custody or power. *Doe dem. Michell v. McLeod*, Mich. Term, 7 Vic.

Conveyance by husband, subject to conditions—Ejectment by wife after husband's decease.]—10. Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son, that he should occupy the house, except certain rooms in it, and take the rents and profits upon certain conditions, on breach of any of which he was to go out of possession, but his mother did not release her right under the statute: *Semble*, that the mother could not, after the father's death, on the ground that she had not barred her dower under the life lease, maintain ejectment for the whole of the premises, without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe dem Peck v. Peck*, i. U. C. R. 42.

Agreement for the sale of land—Breach by vendee—Ejectment—De-

fence of superior title.]—11. A person who makes an agreement to purchase land from another, and enters into possession of the land under the agreement, which he subsequently fails to perform, cannot defend an action of ejectment brought by the heir of the vendor for breach of agreement, by shewing a title purchased over his head; he must first surrender up the premises taken under the contract of purchase. *Doe dem. Mill v. Mill*, ii. U. C. R. 26.

Landlord defending by a title paramount.]—12. Where the defendant in ejectment defended as the landlord of the tenant in possession, and the lessor of the plaintiff proved a mortgage in fee from the tenant himself, but did not further shew the defendant's title to the land, and established no privity between the defendant and himself, and the defendant having shewn title paramount in himself to the land: *Held*, that he was entitled to recover. *Doe dem. Mathewson v. Ault*, ii. U. C. R. 31.

Satisfied mortgage in third party to defeat plaintiff's title.]—13. *Held*, that a satisfied mortgage in fee to a third party cannot be set up by a stranger as a subsisting title, to defeat the true owner of the estate. *Semble*, that a widow cannot be allowed to set up a mortgage to a third party against the heir of the husband. *Doe dem. Kenny et Ux. v. Johnson*, iv. U. C. R. 508.

Effect of party having a good title, obtaining collusive possession through tenant.]—14. A., purchasing land at a sheriff's sale, having reason to believe that he cannot get possession without legal proceedings against the execution debtor, to avoid this he contrives by collusion with C., B.'s tenant to get into possession without the consent of B.: *Held*, in an action of ejectment brought by B. against A., that A. thus acquiring possession collusively through B.'s tenant, cannot set up any title in

himself adverse to B.—that before he can do this, however good his title may be, he must abandon the possession obtained through C., and bring an action against B. *Doe dem. Miller v. Tiffany*, v. U. C. R. 79.

Evidence to support the plaintiff's title — Necessity of going into his whole case at once.—15. The lessor, in an action of ejectment, supported his title by proof of a deed given to him for the consideration of love and affection. The defendant proved his title by a subsequent deed from the same party for a valuable consideration, and then endeavored to impeach the first deed as being voluntary, and on that account void as against him, a bona fide purchaser for value. The plaintiff then offered to repel this evidence, by calling witnesses to prove that the first deed was given for a real consideration, beyond what was expressed in the deed. This was objected to by the defendant, as going into a new case, and the learned judge rejected the evidence: but *Held per Cur.*, overruling the decision at Nisi Prius, that the evidence might have been received, the principle that the plaintiff should go into his whole case at once not admitting of such a strict application in actions of ejectment. *Doe dem. Lawrence et Ux. v. Stalker*, v. U. C. R. 346.

Lease void for non-payment of rent — Distress by lessor for the rent — Lessee's right to bring ejectment against lessor keeping possession.—16. A. leased a mill for a term of years to B. C. and D., who covenanted to pay the rent without default, otherwise the deed to be null and void, and A. covenanted that they should hold quiet possession of the premises during the term, provided they should perform all the covenants. Two quarters' rent being in arrear, A.'s agent broke into the mill, which was locked up, and afterwards obtained the key from one of the lessors, and A. distrained

for rent such property as he found in the mill, which proved insufficient to pay the rent due, and refusing to give up the possession the lessees brought ejectment: *Held*, that the lease being void by reason of the non-payment of the rent, and the distress being equivalent to a demand, he was not liable to be treated as a trespasser for continuing in possession, and that the lessors of the plaintiff could not recover. (Macauley, J. dissentiente.) *Doe dem. Somers et al. v. Bullen*, v. U. C. R. 369.

Ejectment against wife of an attainted traitor — Defence of title in the Crown.—17. *Semble*: That the wife of an attainted traitor remaining in possession of her husband's land cannot defend the recovery of the plaintiff in ejectment, (the purchaser at sheriff's sale in an action brought against the traitor upon a bond entered into before his attainder,) by setting up under the attainder a title by forfeiture in the Crown, which the Crown had foreborne to assert. *Doe dem. Gillespie v. Wixon*, v. U. C. R. 132.

Landlord allowed to defend without affidavit.—18. A landlord may be admitted to defend in ejectment without an affidavit stating that he is so. *Doe dem. Griffin v. Lee*, Tay. U. C. R. 312.

[See further case, 23 *infra*, and *INFANT*, 4.]

Striking out one of two demises after verdict.—19. Where upon two separate demises laid in a declaration a verdict passes for the plaintiff on one and for the defendant on the other, the Court will not, upon an application of the defendant, strike out the demise to the successful plaintiff on the ground of want of authority for suing in his name, except in very clear cases. *Doe dem. Simpson et al. v. Molloy et al.*, vi. U. C. R. 303.

Release of action by lessor.—20. A lessor in ejectment will not be allowed to release the action. *Doe dem. Boyer et al. v. Claus*, iii. O. S. 146.

Right to possession of any part of land sued for entitling to verdict.]

—21. In ejectment, where the plaintiff proves his title to the possession as to any part of the premises sued for, he must obtain a verdict, and the Court will not go into the question of boundary, in order to determine the precise quantity of land he is entitled to recover. *Doe dem. Sheldon v. Ramsay et al.*, vii. U. C. R. 446.

Evidence necessary in cases of disputed boundaries.]—22. In all ejectments brought on account of disputed boundaries the plaintiff has to shew, beyond any reasonable doubt, that he is entitled to some land at least of which the defendant is in possession. Where the point is a doubtful one, the plaintiff must be prepared to shew that he has had a survey carefully made, and that the proper steps have been taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection, or can be established by evidence, in order that the Court and jury may see whether the two lots in question are, by the proof which the plaintiff is seeking to establish, made to occupy their proper position on the concession line. *Sem. ble*: That an admitted copy of the field notes from the Crown land office may be received in evidence. *Doe dem. Strong v. Jones*, vii. U. C. R. 385.

When mortgagee allowed to defend as landlord.]—23. A mortgagee will not be admitted to defend as landlord, in ejectment, unless he can shew that the tenant is his mortgagor, or holds under his mortgagor. *Doe dem. Malloch v. Roe*, Mich. Term, 1 Vic.

Expiration of title before trial—Damages.]—24. A lessor, who had the title to the premises at the time of action brought, but not at the time of trial, is entitled to damages, although he cannot recover his term. *Doe dem.*

Meyers v. Blakier, Easter Term, 2 Vic.

[See statute 14 & 15 Vic. ch. 114, which alters the proceedings in the action of ejectment.]

ELECTIONS.

See BANK OF UPPER CANADA, 1.—DISTRICT COUNCIL, 12, 13.—LIBEL SLANDER, II. 7.—LONDON (TOWN OF), 3.—MANDAMUS, 4, 5.—QUO WARRANTO:

Declaration under 4 Geo. IV. ch. 4, for costs.]—In an action under 4 Geo. IV. ch. 4, sec. 35, to recover the costs incurred by a member of parliament in opposing a petition against his return, it is sufficient to declare in the general form mentioned in the statute, and it is not necessary to aver any demand of the costs. *Smith v. Rourke*, Hil. Term, 5 Vic.

ELEGIT.

Judgment not a lien for the purpose of.]—1. A judgment is not a lien upon lands for the purpose of an elegit, so as to avoid the effect of a writ of fieri facias against lands, issued on another judgment subsequently entered, but placed in the sheriff's hands prior to the elegit. *Doe dem. Henderson v. Burtch*, ii. O. S. 514.

2. *Quære*: Can an elegit be issued regularly in this province? *Ib.*

EMBRACERY.

See NEW TRIAL, VII. 3.

ENQUIRY (WRIT OF).

See WRITS OF TRIAL ETC.

ENROLMENT.

See BAIL III. 7.—DEED, III.

EQUITABLE JURISDICTION.

See ATTORNEY, III. 17, 18.

EQUITY OF REDEMPTION.

See EXECUTION, 11.—MAINTENANCE (STATUTE OF), 7.—MORTGAGE, 5, 13.

ESCAPE.

See FALSE IMPRISONMENT, 1.—LIMITS, II. 12, 13.—SHERIFF, IV. 3, 6, 7.—VERDICT, 10.

What is.]—1. The Court refused to discharge a prisoner from custody upon the ground that the gaoler, having taken him before a magistrate without warrant, had suffered a voluntary escape. *Robinson v. Hall*, Tay. U. C. R. 625.

[A debtor in custody of the sheriff on mesne process was taken after the writ was returnable by the gaoler to a revising barrister in the same county, and returned the same day. It was held that this was an escape. *Williams v. Mostyn*, iv. M. & W. 145.]

Attorney, as such, not allowed to discharge defendant from custody.]

—2. An attorney (merely as such), is not authorized to discharge a defendant in execution—certainly not without receiving the debt, and a sheriff so discharging a debtor upon his authority will be liable as for an escape. *Brock v. McLean*, Tay. U. C. R. 548.

[See *Stocking v. Cameron*, 26 *infra*.]

Variance between pleadings and evidence.]—3. In an action on the case against a sheriff for not arresting a debtor, an averment in the declaration of the issuing of an *alias* writ of ca. re., to support which an *original* writ of capias was produced at the trial, the variance was held immaterial. *Wood v. Sherwood*, iv. O. S. 128.

[Also see VARIANCE, 10.]

Prisoner brought up on a habeas corpus—Subsequent detention]—4. It is not illegal to issue a writ of habeas

corpus to bring up a debtor in custody on an attachment for the non-payment of costs, and the sheriff cannot therefore justify an escape from the attachment on the ground that the debtor was brought up by habeas corpus by the plaintiff, and that it would have been illegal for the sheriff afterwards to detain him, and so he permitted him to leave his custody. *Graham v. Kingsmill*, Mich. Term, 7 Vic.

Plea of no indorsement on writ.] 5. A plea to an action for an escape, alleging “that the ca. sa. was not indorsed with the sum set out in the declaration,” was held bad on special demurrer. *Brock v. McLean*, Tay. U. C. R. 423.

What equivalent to an escape.]—6. Where a sheriff refuses to produce a prisoner in his custody twenty-four hours after notice, it is an escape. *Wragg v. Jarvis*, Mich. Term, 6 Wm. IV.

Evidence of escape under pleadings.]—7. Where in debt for an escape on a capias ad satisfaciendum, the sheriff pleaded that he gave the prisoner the benefit of the limits, and that she never left them &c., the plaintiff replied that she did leave them: *Held*, that the plaintiff shewed an escape under this issue by proving that after the prisoner was admitted to the limits she was remanded back to custody, that the order remanding her was delivered to the sheriff, and that he received due notice to produce her body, but failed in doing so. *Ib.*

Averment of party escaped having been indebted to plaintiff—Plea denying it—Evidence.]—8. In an action against a sheriff for the escape of A., arrested on a ca. re. at the suit of the plaintiff, the declaration averred “that he was indebted to the plaintiff in a large sum of money, to wit, &c., upon and in respect of certain causes of action before then accrued to the plaintiff against the said A. &c.” The

defendant pleads, denying that A. was indebted to the plaintiff in manner and form as the plaintiff alleged. *Held*, that under these pleadings, the plaintiff would be entitled to recover if he shewed that *any debt* accrued to him against A. before he sued out the writ. *O'Reilly v. Moodie*, iv. U. C. R. 266.

Sheriff not allowed to raise technical objections.—9. *Held*, that it is not open to a sheriff sued for an escape to set up technical objections in regard to forms of action and points of practice, having nothing to do with the fact of the existence of a debt, which perhaps the debtor himself might have urged in the original suit. *Ib.*

[Also see 12 and 17, *infra*.]

Writ issued from District Court—Escape therefrom—Averments.—

10. In a declaration for an escape on a writ issued from a district court the making and filing of an affidavit of debt must be alleged. *Wragg v. Jarvis*, and *Munson v. Hamilton*, Easter Term, 6 Wm. IV.

Escape on attachment for contempt—Liability of sheriff.—11. A sheriff is liable for the escape of a party attached for contempt of court, in not performing an award; and it is not necessary, in order to this action, that the party should be brought up on the return of the writ of attachment, and formally committed by the Court. *Huntley v. Smith*, iv. U. C. R. 181.

Sheriff cannot object to any proceeding prior to the order authorizing the attachment.—12. To an action against a sheriff for the escape of a party attached, he will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award—he cannot go further back than the order authorizing the attachment. *Ib.*

[See case 17, *infra*.]

Averment of party being before the court on the return day, omitted.—

13. *Semble*: In an action against a sheriff for an escape on a writ of attachment, for non-performance of an award, the omission by the plaintiff to aver that the sheriff had not the party before the Court on the return of the writ of attachment, though not bad on general would be bad on special demurrer. *Ib.*

Plea, that prisoner escaped unknown to sheriff, and voluntarily returned.—14. To an action for an escape against a sheriff, a plea that the prisoner escaped without the knowledge of the sheriff, to places unknown to the sheriff, and voluntarily and without the knowledge of the sheriff, returned into custody of the sheriff, is insufficient; the plea ought to aver that the sheriff did not know where the prisoner was during any period of his absence. *Lane v. Kingsmill*, vi. U. C. R. 579.

Necessary averments, where attachment considered as mesne or final process.—15. *Semble*: That if an attachment for contempt in not paying monies is to be regarded as mesne process, it should be averred in a declaration for an escape that the sheriff had not the party in Court to answer the exigency of the writ; and if the attachment is to be regarded as an execution, *semble*, it then requires something in the nature of a judgment to support it.—The merely averring that the plaintiff sued out an attachment for contempt, without stating what the contempt consisted in, or by what authority it had been determined the party was guilty of contempt, is insufficient—a good legal foundation for the attachment must be shewn on the record. *Ib.*

Averment of escape being before or after return of writ.—16. *Semble*: That it is not necessary, in declaring for the escape of a defendant surrendered before judgment, to shew whether it was before or after the return of the writ. *Shouldice v. Fraser*, vii. U. C. R. 60.

Debt for—Plea, satisfaction before writ issued.]—17. In debt for an escape, the sheriff cannot plead satisfaction previous to the issuing of the writ from which the escape was made, in bar of the action. *Munson v. Hamilton*, Easter Term, 6 Wm. IV.

Liability of new sheriff for escapes at the time of his appointment.]—18. On the death of a sheriff, his deputy is charged with the execution of his office until a new sheriff is appointed, and he must assign over by indenture as well the debtors on the limits as those in custody; and a new sheriff is not liable for the escape of a debtor on the limits at the time of his appointment, without such assignment. *McPherson et al. v. Hamilton*, Easter Term, 7 Wm. IV.

Action for escape on mesne process—Bail bond.]—19. An action for an escape on mesne process, will not lie where a valid bail bond has been taken. *Wilson v. McCullough*, Mich. Term, 2 Vic.

Party to be sued for an escape.]—20. An action for an escape should be brought against the sheriff, and not against the bailiff who arrested, unless the sheriff has been guilty of a rescue. *Id.*

[No action lies against the sheriff for breach of duty, unless the party bringing it has sustained actual damage. *Barker v. Green*, 2 Bing. 317, (inaccurately reported).—See note to title, "Escape," M. & W. index.]

Liability of sheriff for an escape when debtor arrested without a warrant.]—21. A sheriff is not liable for an escape where a bailiff arrests a debtor, when he has no warrant against him, although he has the writ in his possession; nor is the sheriff liable on a count for not arresting under such circumstances. *Rigney v. Ruttan*, Hil. Term, 2 Vic., and *Falconridge v. Hamilton*, Easter Term, 2 Vic.

Action by sheriff against bail to the limits.]—22. A sheriff may bring an action against bail to the limits for the escape of a debtor before he has been

sued or paid the money for which the debtor was in execution. *Ruttan v. Wilson et al.*, Mich. Term, 3 Vic.

Liability of sheriff for escape on a void writ.]—23. Where a sheriff arrested a debtor under mesne process issued from a district court in an action of trespass, and afterwards suffered him to escape: *Held*, that he was not liable therefor, the writ being void. *Smith v. Jarvis*, Hil. Term, 3 Vic.

Plea of insufficiency of gaol.]—24. In an action for an escape on final process, a plea of the insufficiency of the gaol is void. *Rowan v. McDonell*, Hil. Term, 3 Vic.

Plea of return, without stating time.]—25. Where in an action against a sheriff for the escape of a debtor on the limits, the defendant pleaded that the debtor returned to the limits before action brought, but stated no specific day on which he returned, for which the plaintiff demurred specially—the plea was held good, and an answer to the action. *Andruss v. McDonell*, Mich. Term, 4 Vic.

Plea of discharge by direction of plaintiff's attorney—Plea of satisfaction to plaintiff's attorney.]—26. In an action for an escape, it is a good plea that the plaintiff's attorney having received the debt and costs, authorized the sheriff to discharge the debtor; but it is not good to plead that after the escape the sheriff paid the attorney a sum of money in full satisfaction of the original debt and costs, and of all damages arising from the escape. *Stocking v. Cameron*, Mich. Term, 6 Vic.

—♦— ESSOIGN.

See DOWER, II. 15.

—♦— ESTATE.

See ALIEN, 1.—JOINT TENANCY, 1, 2, 3.—MAINTENANCE (STATUTE OF), 5.—WILL, 7.

Estate for life or in fee.—1. *Semble*, per Sherwood, J., that a devise of lands to the testator's wife for life, to be at her full and free disposal, to whom and whensoever she pleases, and out of which the testator's just debts are to be paid, gives an estate in fee and not for life, with a power of sale. (Macaulay, J., contra). *Doe dem. Humberstone v. Thomas*, iii. O. S. 516.

[See case 8, *infra*.]

Estate for life by implication.—2. A devise "of all the proceeds" arising from a farm for life, gives an estate for life in the farm by implication, especially where the devisee over in fee is entitled to the cattle and effects on the farm, by the express words of the devise, only on the death of the devisee, for life. *Brennan et Ux. v. Monro*, Easter Term, 3 Vic.

Devise to a daughter, without words of inheritance, and devise of the residue to sons in fee, gives a fee to all.]

—3: Where a testator devised lands to his daughter, without words of inheritance, and devised the rest of his estate, except that devised to his daughter, to his sons in fee: *Held*, that the daughter also took a fee simple in the lands devised to her. *Doe dem. Stevenson v. Hainer*, Mich. Term, 3 Vic.

For life or in fee.—4. Where a testator devised as follows: "As touching my worldly estate, I give, devise, and dispose of the same in the following manner. I will that my just debts be paid, should any remain unpaid at my decease: I hereby give and bequeath unto my executors, hereinafter named, my real property, for the purpose of satisfying the same; after which I will that the residue of my lands, messuages, hereditaments, and premises, with my personal estate, or the proceeds thereof, (if sold by my executors, which I hereby authorize them to do for the benefit of my children), be divided in equal shares among my

six beloved children, viz., A. B. C. D. E. & F.," and then appointed certain persons to be his executors: *Held*, that the children took an estate in fee and not for life, in the real estate. *Baby v. Baby*, i. U. C. R. 54.

Vested estate in remainder, with limitation over—5 Geo. II. ch. 7.]—

5. *Held*, upon the following will, devising certain lands to the testator's wife for life, "and after her decease then unto her son William Cumming, his heirs and assigns for ever, provided that the said William Cumming will pay all demands that may be against the said William Cumming, by his having signed any promissory notes with his said son William, or any other sum or sums that he might be owing on account of his said son William, and if his said son William should make default in paying all demands as aforesaid, or if any part thereof should be collected from any devise in the said will mentioned, then, and in that case, he devised the said land to his daughter Margaret, her heirs and assigns for ever," that William Cumming the son, took a vested estate in remainder, with a conditional limitation over to his sister, in case of a certain event happening, and that such estate of William could be sold under 5 Geo. II. ch. 7, during the life-time of his mother. *Doe dem. Jarvis v. Cumming*, iv. U. C. R. 390.

For life, or in fee—Reversionary interest.—6. *Held*, under the following will, (the testator dying before the statute 4 Wm. IV. ch. 1 came into force), "And touching my worldly estate, I give and dispose of the same &c.," then follow various devises to several children, then the will goes on "all other property of which I shall die possessed and not herein mentioned, I wish to be divided among the five children above named." The testator then added, "to the Honorable A. B. of Kingston, Esquire, I give and bequeath Lot No. 9, in the 7th conces-

sion of the township of Nelson, and county of Halton, and I appoint the said A. B. one of my executors." That A. B. took only an estate for life in No. 9, and that the reversionary interest in that lot passed to the residuary devisees, the testator's five children, and not to the heir-at-law. *Doe dem. Ford et al. v. Bell et al.*, vi. U. C. R. 527.

Power to sell or take the fee.—7. Where the testator directs his executor, as soon as convenient after his death, to make sale to the best advantage of his estate—first, for the payments of his debts, and then to divide the surplus proceeds among his children: *Held*, that the executor in such case takes no estate in the land, but merely a naked power to sell, the fee in the meantime descending to the children. *Gregory et Ux. v. Connolly*, vii. U. C. R. 500.

Estate for life, or in fee.—8. *Held*, that a devise to the testator's wife of land, "to be at her will and disposal during her life," with a subsequent direction in the will as to what should become of the estate after the wife's decease, gave the widow only an estate for life, and not an estate in fee. *Doe dem. Keeler v. Collins*, vii. U. C. R. 519.

Estate for life, or in fee.—9. A testator, after making specific devises of certain lands, then adds, "at which time (i. e. after his youngest son shall have arrived at the age of 21 years,) it is my will that the whole of my lands be divided in four equal parts,—one part of which I give and bequeath to my two daughters A. and B., the other three parts to be divided among my three sons, C., D. and E." *Sem. ble*: That under this devise of the residuary estate, the devisees took not a vested estate, but a contingent and future estate, and that for life only; the estate in the meantime vesting in the heir-at-law. *McLellan et Ux. v. Meggatt et al.*, vii. U. C. R. 554.

Right of wife to dower out of a contingent estate.—10. *Semble also*, that the heir-at-law would then have an estate, which would not entitle his widow to her claim for dower, the estate not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon a distribution being made in pursuance of the will. *Ib.*

Estate of trustees.—11. A devise to trustees to convey gives a fee simple in joint tenancy, without words of inheritance. *Doe dem. Berringer v. Hiscott*, Mich. Term, 3 Vic.

Estate tail.—12. A devise "to a son of the testator and his heirs forever, and in failure of male heirs lawfully begotten by him to the heir-at-law of another son," gives only an estate tail to the first son. *Doe dem. Butler v. Stevens*, Mich. Term, 3 Vic.

Estate tail.—13. A testator devised certain lands to his daughter, to hold during her life, and afterwards to her heirs forever, and then adds,— "should it so happen that my daughter shall not have heirs &c.:" *Held*, that under these additional words the daughter takes only an estate tail. *Doe dem. Anderson et al. v. Fairfield*, iii. U. C. R. 140.

Fee simple—Estate tail—Illegal restrictions.—14. A. being seized of certain lands, devised them to his son John, "to hold to him and his heirs forever," and then added, "my will is that none of my sons shall have power to alienate the lands thus bequeathed to them respectively, but they shall transmit them from father to son, or the next nearest heir, so that they may be always preserved in the family:" *Held*, that under this devise, John took an estate tail by implication, and that the restriction in the will being only such as distinguished an estate in tail, was not an illegal restriction. *Doe dem. McIntyre v. McIntyre et al.*, vii. U. C. R. 146.

Devise by mortgagee of several legacies, and afterwards of all his estate.]—15. After a devise by a mortgagee of several legacies, the will proceeded: "The above mentioned legacies to become due and payable in money or securities twelve months after my decease, and each legatee to be entitled to the interest and profit on their respective legacies from the time of my decease. Lastly, I give and bequeath unto my two nephews, A. and B. the residue and remainder of my property, real and personal, after paying the above named legacies, to be divided among them equally, share and share alike: *Held*, to vest the mortgage estate in the nephews, the devisees. *Doe dem. Helliwell v. Hugill*, Mich. Term, 5 Vic.

ESTOPPEL.

See ARBITRATION ETC., IV(3), 5, 9. ARREST, IV. 16.—BILLS OF EXCHANGE ETC., II. 8 — COGNOVIT, 12.—EVIDENCE, V. 5.—EXECUTOR ETC., I. 6; III. 2.—MESNE PROFITS, 8.—MORTGAGE, 5.

Bond to a party by a nominee of the Crown—Deed in fee to another party after patent issued.]—1. Where the nominee of land from the Crown gave a bond for a deed of the land to be made when the patent should issue, and in the same bond conveyed and covenanted to guarantee the title: *Held*, on ejectment brought by a party claiming from the nominee under a deed executed by him after the letters patent issued, that this bond gave to the obligee no title by estoppel. *Doe dem. McGill v. Shea*, ii. U. C. R. 483.

Conveyance in fee by nominee before patent—Conveyance after patent to another party.]—2. A nominee of the Crown before the issuing of letters patent makes a conveyance in fee to one person, he afterwards obtains a patent granting the estate to himself,

and then conveys to another, who again conveys: *Held*, that the patentee of the Crown and his assigns as privies in estate, are estopped by the first conveyance, and that the patent feeds the estoppel and makes it a vested interest and estate. *Doe dem. Hennessy v. Myers*, ii. O. S. 424.

3. Where the nominee of the Crown before any patent issued, by deed-poll conveyed away the lands and all his interest in them, and afterwards the patent was issued in his name, and he then made a second deed to another person: *Held*, that the second grantee was estopped from claiming the land by the first deed. *Doe dem. Irvin, v. Webster*, ii. U. C. R. 224.

Lease for a year—Deed in fee to a second party before expiration of the year—Mortgage for purchase money—Assignment of lease—Ejectment.]

—4. A., on the 14th of August 1844, demises certain lands to B. and C. for a year, from 1st January 1845.—A., afterwards, on 23rd of August 1844, conveys in fee the land to D., taking back on the same day a mortgage to secure the payment of the purchase money on a certain day, the mortgagor to remain in possession until default. On the 1st of December 1845, B., one of the lessees, lets E. into possession for a month, bringing the time up to the end of the term for which A. had demised to B. and C.—E. refused to go out at the end of the month, upon which D. brought an action of ejectment: *Held*, that E. was not estopped, as tenant of the assignee of A., from shewing that the title the assignee had once held—and that but for a moment—had ceased by reason of the mortgage back to A., under which A., and not D., since the default made, was entitled to possession, and that judgment should be entered for the defendant. *Doe dem. Marr v. Watson*, iv. U. C. R. 398.

Covenant for good title by assignee of vendee against vendor—Assignee

not estopped by vendee's recital.—5. A. makes a conveyance to B., covenanting that "at the time of making the conveyance he was lawfully seized of a perfect and absolute estate of inheritance in fee simple." B. afterwards conveys to C., reciting that he was then possessed in his own right of the land in question: *Held*, in an action brought by C., the assignee of B., against A. upon his covenant for good title, that C. was not estopped by B.'s recital. *Gamble et al. v. Rees*, vi. U. C. R. 396.

Cognovit by bankrupt in contemplation &c.—How far an estoppel against the assignees.—6. Where a cognovit has been given by a bankrupt in fraud of the bankruptcy law, and it is therefore, with all steps taken under it, void, the assignees of the bankrupt in bringing an action against the sheriff must be looked upon as contending for the interest of the creditors, and not merely as representing the person or estates of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings, on the ground of fraud. *Ponton v. Moodie*, vii. U. C. R. 301.

Indorser of a bill estopped from denying the competency or signature of drawer.—7. The indorser of a bill is estopped from the fact of his indorsement, from denying either the signature of the drawer or her competence, (being a feme covert in this case), to draw the bill. *Ross et al. v. Dixie*, vii. U. C. R. 414.

Grantee by taking deed from grantor, not estopped from denying grantor's seizin.—8. The grantee, by taking a title from the grantor, does not thereby estop himself from denying that his grantor was legally seized. *Dittrick v. O'Connor*, vii. U. C. R. 448.

Set-off—Estoppel by verdict.—9. Where A. is sued by B., and is seeking to set-off a demand for which he

has already sued A., and has had a verdict: *Held*, that he is estopped by such verdict from bringing the same identical demand a second time before the jury by way of set-off. *Russell v. Rowe*, vii. U. C. R. 484.

ESTREAT.

See JURY, 3.—POUNDAGE ETC., 4.—RECOGNIZANCE, *passim*.

EVICTIION.

See COVENANT, II(1), 6; II(2), 1, 2, 3, 12.—REPLEVIN ETC., 2.

EVIDENCE.

See COMMISSION TO EXAMINE WITNESSES.—ONUS PROBANDI.—WITNESS.

- I. PAROL EVIDENCE.
- II. SECONDARY EVIDENCE.
- III. HEARSAY EVIDENCE.
- IV. RECORDS AND PUBLIC DOCUMENTS.
- V. WRITINGS GENERALLY.
- VI. PRESUMPTION OF DEATH.
- VII. ADMISSIONS AND DECLARATIONS.
- VIII. MISCELLANEOUS MATTERS.
- IX. EVIDENCE IN PARTICULAR CASES.

I. PAROL EVIDENCE.

See BILLS OF EXCHANGE ETC., I. 3, 4, 6, 9, 17; VII. *passim*.—CROWN GRANT, 4, 5, 6.—EVIDENCE, IV. 1. SHERIFF'S DEED, 6.

Evidence of an allowance for road—Parol evidence admissible.—1. Where in trespass for cutting timber the question was, in which of two townships there was an allowance for road, and the grants from the Crown not being very explicit, the plaintiff

endeavored to support his construction of the grant by parol evidence, which was rebutted by the defendant by parol testimony also, and the jury found for the defendant,—the Court held such finding right, and that parol evidence was admissible. *Miller v. Palmer et al.*, iii. O. S. 425.

To contradict a deed.—2. Parol evidence cannot be received that a deed absolute in its terms was intended only as a security. *Gilmour v. Hayes*, Hil. Term, 7 Vic.

[Nor can it be received to contradict the terms of written instruments in general, as bills &c.—*Adams v. Bingley*, i. M. & W. 374; *Doe v. Birch*, i. M. & W. 402; *Magee v. Atkinson*, ii. M. & W. 440; *Higgins v. Senior*, viii. M. & W. 834. It is however admissible to shew that a deed purporting to be made in consideration of natural love and affection was made in reality for a valuable consideration. *Gale v. Williamson*, vii. M. & W. 405.]

Parol evidence to explain a will.—3. *Held*, upon the following will:—“Know ye, that I, A. B., do bequeath all and every part of my real property situated in the township of Huntley, viz, &c.” that parol evidence was admissible to shew that the testator did not own 26, but 22 in the 6th concession of Huntley, and that (it appearing upon such evidence that lot 26 had been inserted by mistake in the will for lot 22) lot 22 would pass under the will. *Doe dem. Lowry v. Grant*, vii. U. C. R. 125.

Parol evidence to control a written contract.—4. The defendant agreed that upon the plaintiffs’ assigning to him a life policy of insurance for 5000*l.* sterling, he would pay them 6000*l.* currency, and in suing the defendant for the non-payment of the 6000*l.*, the plaintiffs averred that the policy which the defendant was to receive was one for 3000*l.* only, and not for 5000*l.*, and that he (the defendant) well knew it. On demurrer to this averment, the Court held the declaration bad upon the general principle of law, that the terms of a written contract could not

be varied or controlled by parol testimony. *Bank of Upper Canada v. Boulton*, vii. U. C. R. 236.

Conversation prior to written agreement.—5. Evidence of a conversation prior to the execution of a written agreement cannot be received to alter the terms of such agreement. *Gilpin v. Greene*, vii. U. C. R. 586.

Agreement within the Statute of Frauds—Operation of verbal agreement.—6. An agreement in writing within the Statute of Frauds may be waived, discharged and determined by a subsequent verbal agreement. *Mulgrew v. Pringle*, Dra. Rep. 282.

[See *Marshall v. Lynn*, vi. M. & W. 109.]

Quære: Whether before or after breach of the agreement? *Ib.*

II. SECONDARY EVIDENCE.

See EJECTMENT, VIII. 2.—EVIDENCE IV. 2, 3, 4.—MORTGAGE, 8.—NOTICE TO PRODUCE.

Evidence to go to jury in proof of a bond.—1. The recognition of a bond in a letter from the defendant to the plaintiff with proof that a document purporting to be a copy or draft of such an instrument was shewn by the defendant with the title deeds of an estate to which it related, is evidence to go to a jury in proof thereof, after notice by the defendant to produce any such bond, copy, or draft. *Rochleau v. Bidwell*, Dra. Rep. 357.

[If a party be entitled to give secondary evidence, he may give any species of secondary evidence within his power—there are no degrees of secondary evidence. *Doe dem. Gilbert v. Ross*, vii. M. & W. 102.]

Necessity of producing the best evidence—Notice to produce.—2. In assumpsit for the delivery of goods, after the plaintiff had proved a verbal agreement, the delivery of part of the goods, and also an undertaking by the defendant that he would not exercise a certain trade within a fixed distance of the plaintiffs, the defendant gave in evidence a copy of the affidavit of

debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce, and the copy of the agreement in the affidavit of debt not stating anything about that part of the undertaking proved by the plaintiff concerning the exercise of the defendant's trade: *Held*, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement by their affidavit of debt, and that as the writing was the best evidence, it should have been produced, and that that part of the evidence concerning the exercise of the defendant's trade, not being contained in it, should have been rejected. *Gilbert et al. v. Sleeper*, iii. O. S. 135.

Proof of promissory note being in satisfaction of work—Notice to produce the note.—3. Before parol or secondary notice can be given of a note being received by the plaintiffs in satisfaction for work done, the defendant must prove that he has given notice to the plaintiff to produce the note. *Heward v. McDougall*, iii. O. S. 647.

Ejectment by party claiming under a Crown lease—Evidence of his having parted with his interest.—4. Where in ejectment notice to produce a Crown lease, under which the lessor of the plaintiff claimed, had been given, and the lease was not produced, but an exemplification of it was put in, and the defendant gave parol testimony that the lease had been assigned to a third party who had given a mortgage on it to the lessor of the plaintiff, which had been paid at the day, and the jury found for the defendant: *Held*, that the evidence that the lessor of the plaintiff had parted with his interest was sufficient to support the verdict. *Doe dem. Crawford v. Cobbledike*, Mich. Term, 6 Wm. IV.

Memorial, secondary evidence of a deed.—5. In case of a lost deed, a memorial is good secondary evidence of such parts of the deed as are transcribed in it, without calling the subscribing witness. And since the Real Property Act 4 Wm. IV. ch. 1, which makes a deed of bargain and sale valid without registry, it is no objection to a memorial of such a deed, produced as secondary evidence, that the additions of the subscribing witnesses to the deed are not inserted in the memorial, as required by the Registry Act. *Doe dem. England v. Crysdale*, Mich. Term, 5 Vic.

[See also, cases 9, 10, 11 *infra*.]

Statements made by counsel respecting a will—Production of the will necessary—6. Where in ejectment the plaintiff's counsel in opening his case stated it as a question of legitimacy and that the defendant claimed under a will, and the defence was conducted without the production of the will, as if the statement of the counsel had rendered that unnecessary: *Held*, that it ought to have been produced. *Doe dem. Breakey v. Breakey*, ii. U. C. R. 349.

Ejectment—Proof of marriage.—7. Proof of marriage by reputation and cohabitation for twenty or thirty years is sufficient in ejectment, and if the presumption therefrom is to be rebutted, it must be by positive testimony. *Ib.*

Secondary evidence received—Objections afterwards as to search.—8. After secondary evidence of the contents of a document has been received, it is too late to object that a proper search for the document itself had not been made. *Doe dem. Maclem v. Turnbull*, v. U. C. R. 129.

[The question whether there has been a sufficient search or not, depends on the nature of the instrument searched for. *Per Alderson, B., Gathercote v. Miall*, xv. M. & W. 335.]

Memorial of a mortgage given by a party to prove seizin in that party.—9. On a traverse of office a memorial of a mortgage for years from an

alien to the original grantee of the Crown, under whose heir traverser claims, is not conclusive evidence of a seizin in fee in the alien at the time of the mortgage. *Rex v. Theale*, Dra. Rep. 331.

Memorials more than thirty years old prove themselves.—10. A memorial more than thirty years old of a lost deed is good evidence upon its bare production, without calling or accounting for the subscribing witness. *Doe dem. Maclem v. Turnbull*, v. U. C. R. 129.

11. *Semble*: That this principle extends to any written document more than thirty years old, even to letters. *Ib.*

Allowance for road—How far proved by original plan.—12. The piece of land marked out in the original plan of a township as an allowance for a road, does not lose that character because it has never been used as a road for forty years, and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled. *Badgley v. Bender*, iii. O. S. 221.

Secondary evidence of a lost note, when admissible.—13. Where a promissory note had been indorsed to an attorney's clerk in the course of business, and mislaid: *Held*, that secondary evidence of it could not be given, without calling the clerk, although the attorney was called, and sworn to his belief of its loss. *Groves v. Clark et al.*, Trin. Term, 6 & 7 Wm. IV.

III. HEARSAY EVIDENCE.

Proof of grantee being alive when Crown grant issued in his name.—

1. Ejectment—at the trial the plaintiff put in an exemplification of a patent dated 10th March 1797, granting certain lots in fee to A. It was then proved that A. married in this pro-

vince in 1794, and had two daughters, that one of the lessors was one of those daughters, that the other lessor was the son of the other daughter; that A. left this province for New York in the fall of 1796, and was heard of as having gone from thence to the West Indies, and it was so understood and believed in his family ever since. The defence was that he died before the 10th March 1797, and that therefore the patent dated to him on that day was void, and that a second patent issued in consequence thereof; and a patent issued in 1801, granting these same lands to B. in fee, was put in. It was next offered by the defendant to prove a petition from the widow of A. to the Court of Probate, praying for letters of administration, and stating the day of his death as evidence of his death on that day. The learned judge rejected it. The letters of administration were put in. It was next proposed to put in a petition, signed by some members of the family of A., to the executive government, praying that a new patent might issue, in consequence of A.'s death before 10th March 1797, as a declaration of that fact by relatives of the family. It did not appear who the parties were that signed the petition. The learned judge rejected that also. The defendant then offered in evidence the memorial of B., praying that a new patent might issue to him, alleging that the patent of the 10th March 1797, was issued subsequently to the death of A., and asking the grant for the benefit of A.'s creditors, of whom B. was one, with consent of A.'s administratrix. This was also rejected by the learned judge. The defendant then called a witness, a surviving brother of A., who proved that the latter left this province in the fall of 1796, in very bad health, being in fact considered in a desperate condition; that he wrote from New York, stating that he was better and intended proceeding to the West Indies; and that in the following spring the wit-

ness was informed of his death. The learned judge refused evidence of the day on which (as the witness heard) his death took place, or to receive evidence of the family reputation of the day of his death, or to allow the witness to prove the statements of a person who came from the West Indies, stating himself to have been the servant of A., or to prove the contents of certain papers (since lost) which the witness received from the servant, and alleged to have been an inventory of A.'s effects at the time of his death, and an account of the sale of his effects after his death. And upon the evidence admitted, it was left to the jury to say whether A. died before or after the 10th March 1797. If before, to find for the defendant, if after, to find for the plaintiffs: *Held*, (Robinson, C. J., dissentiente), on motion for a new trial without costs, on the ground of misdirection and rejection of evidence, that the evidence rejected by the learned judge (Jones) at the trial, was inadmissible; but, that as the nature and character of some parts of the evidence rejected were not known with sufficient certainty, the Court would grant a new trial on payment of costs. The Chief Justice was also of opinion, that even after the whole of the evidence objected to had been disallowed, the jury would have exercised a sound discretion, in finding for the defendant upon the evidence which had been admitted. *Doe dem. Arnold et al. v. Auldjo*, v. U. C. R. 171.

When hearsay evidence of declarations proving pedigree is admissible.]

—2. Before a stranger can be allowed to give evidence of declarations as to pedigree, made by a relation of the family, there must be shewn, 1st, the death of that relation, and 2ndly, the fact of his relationship to the family, which fact must be proved aliunde, and not by his own assertion. *Doe dem. Dunlop v. Servos*, v. U. C. R. 284.

[See *HEIR*, 2.]

IV. RECORDS AND PUBLIC DOCUMENTS:

See CROWN GRANT, 7.—DEED, III. 11, 12.—EJECTMENT, VIII. 22.—EVIDENCE, II. 5, 10, 11, 12.—JUDGMENT, 18.—MALICIOUS PROSECUTION, 3.—RECORD, 1.

Admissibility of a continuance roll as a record—Parol evidence.]—1. A continuance roll found in the proper office, and entered and filed there by the proper officer, is admissible evidence as a record of the Court of Queen's Bench, although not compared with the papers filed in the cause; and parol testimony cannot be received to contradict the roll. *Prentice v. Hamilton*, Dra. Rep. 410.

Admissibility of an affidavit filed.]—2. To prove that a party made an affidavit which has been filed, a sworn copy of the affidavit, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient. *Spafford v. Buchanan*, Hil. Term, 4 Wm. IV., and *Fitzgerald v. Webster*, Mich. Term, 3 Vic.

Admissibility of copies of exhibits.]—3. Sworn copies of exhibits filed in the Crown office cannot be received in evidence; the originals should be produced. *Nelson et al. v. McDonnell*, Hil. Term, 7 Wm. IV.

Proof of public documents.]—4. Any public document, filed in a public office of the government, may be proved by an examined copy. *McLean v. McDonnell*, i. U. C. R. 13.

Commencement of actions proved by original writ.]—5. The commencement of an action may be proved by the production of the writ of ca. re. The minutes of the clerk of the Crown or his deputy on the writ, marking the time of issuing, is prima facie proof of the fact. *Upper v. McFarland et al.*, v. U. C. R. 100.

V. WRITINGS GENERALLY.

See JUDGMENT, 3.—NEW TRIAL, II. 9, 21; VIII. 4.—RECEIPT.

Certificate of commissioner administering oath of allegiance.—1. The certificate of a commissioner for administering the oath of allegiance, is evidence after his death, and that of the party taking the oath. *Doe M^r-Farlane v. Lindsay*, Dra. Rep. 131.

Proof of bond, where subscribing witness out of the country.—2. Where the subscribing witness to a bond is out of the country, and no one can be found who is acquainted with his hand-writing, evidence of the hand-writing of the obligor is sufficient. *Bennett v. McDonald*, Easter Term, 3 Vic.

Deed—Dispensing with production of subscribing witness.—3. In order to dispense with the production of subscribing witnesses to a deed, it must be shewn that every reasonable enquiry has been made for them in the place where they were most likely to be found, and that they cannot be discovered. *Tylden v. Bullen*, iii. U. C. R. 10.

[See case 6, *infra*.]

Trespass for seizing goods—Letters to prove ownership of the goods.—4. In trespass for seizing the plaintiff's goods, under an execution against the goods of A., it was held, that a letter written by A. before any third party had an interest in questioning the right of the goods, was evidence to go to the jury to shew the footing on which the plaintiff and A. then stood with respect to the goods. *Robinson v. Rapelje*, iv. U. C. R. 289.

Witness to note—When production of, dispensed with.—5. The defendant was sued as maker of a note, indorsed to the plaintiff. There was a subscribing witness to the same, who was not produced at the trial, and no objection was taken on that ground. But as the defendant had, before the indorsement, admitted to the plaintiff that he had made the note, and induced the plaintiff to take it: *Held*, that it was not necessary to prove the note by the subscribing witness, as the

defendant could not be allowed to dispute his own signature. *Perry v. Lawless*, v. U. C. R. 514.

Deed—Living witnesses to be accounted for.—6. A. B. and C. are witnesses to a deed.—A. having been shewn to be dead, his hand-writing is proved; the hand-writing of B., who is also lessor of the plaintiff, in an action of ejectment, is also proved. D., the defendant in the action of ejectment, having proved B.'s hand-writing, rests his proof of the deed there, without attempting to account in any way for the absence of C., the third witness. *Semble*, per Jones, J., that the deed, without accounting for the absence of the witness C., was not legally proved. *Doe dem. McDonald v. Twigg et al.*, v. U. C. R. 167.

Proof of agreement, when signatures of subscribing witnesses doubtful.—7. Although one of two witnesses to an agreement may deny his signature, and a person well acquainted with the hand-writing of the other witness may refuse to say that the signature is genuine, it may still be left to the jury to say, under the circumstances of the case, whether the agreement has not in fact been signed by the parties. *Barber v. Armstrong*, Trin. Term, 7 Vic.

VI. PRESUMPTION OF DEATH.

Ejectment—When death may be presumed—Onus probandi in such a case.—It was proved at the trial of this cause that A. was last seen in the province in December 1827, and was never afterwards heard of. A fi. fa. against A.'s lands was placed in the sheriff's hands on the 13th of July 1833, tested the 29th of June 1833. The heir of A. brought an action of ejectment against the purchaser under the sheriff's sale and attempted to recover upon the ground that, after so many years (about 15) had elapsed over and above the seven years the law presumed A. to have been living

since he was last heard of, the presumption that he did not die till the expiration of the seventh year, though there was no circumstance in evidence to shew that he died earlier, was at an end, and that it was incumbent on the purchaser at sheriff's sale to shew that he did not in fact die till after the seventh year, and that the jury should be directed to find whether he did or did not die within the term of seven years; but *held*, the proper direction to give the jury was that at the end of seven years the fact of death was to be presumed and *not sooner*, unless there was some evidence affecting the probability of life continuing so long, and also that it was incumbent on the heir of A., and not upon the purchaser under the fi. fa., to shew when A. died. *Doe dem. Hagerman v. Strong et al.*, iv. U. C. R. 510.

[The law may presume death after seven years' absence, but not the time of the death. *Nepean v. Doe dem. Knight*, ii. M. & W. 894.]

VII. ADMISSIONS AND DECLARATIONS.

See ACCOUNT STATED, *passim*.—BILLS OF EXCHANGE ETC., V. 20.—CRIMINAL CONVERSATION.—EVIDENCE, III. 2.—EXECUTOR ETC., II. 8, 9. JOINT STOCK COMPANY, 2.—LIMITS, II. 15.—MAINTENANCE (STATUTE OF), 11.—NEW TRIAL, I. 8. RECEIPT, 1.

Admissions of a real plaintiff in ejectment, the lessor being an infant.]

—1. The admissions of the plaintiff in ejectment, being a real person, (the lessor being an infant,) are not evidence, to prevent the recovery of the premises. *Nicholson dem. Spafford v. Roe*, iii. O. S. 84.

Admissions of witness before trial to contradict his own statements at the trial.]

—2. Where the plaintiff in an action of trespass for cutting and carrying away timber, on which issue was joined on a revocation of license, called the agent of the defendant to prove

that he had revoked the license to him and that the defendant still continued to cut the timber, and the witness denied the revocation to him: *Held*, that the plaintiff might call other witnesses to prove that they had heard this witness admit that the license had been revoked to him, and that the witnesses knew that he had still gone on and cut the timber after he had made that admission. *M'Nab v. Stinson*, Trin. Term, 5 & 6 Vic.

Admissions by letter open to explanation.]

—3. Letters written by the parties to a suit, like receipts and other admissions, are always open to explanation, unless under the particular circumstances of the case they may have lead to conduct in third parties involving loss to them by reason of their having acted upon the faith of such letters. *Cuvillier et al. v. Browne*, iv. U. C. R. 105.

When attorney bound by admissions of his client's agent.]

—4. A., defendant's attorney, accepting his instructions from B. as the agent of the defendant, and making his defence under them, is bound at the trial by the admissions B. has agreed to make. *Doe dem. M'Donald v. Long*, iv. U. C. R. 146.

Declaration of testator as to his age.]

—5. The declarations of a deceased testator respecting his age at the time of the execution of his will are not admissible as evidence. *Doe dem. Stephen et Ux. v. Ford*, iii. U. C. R. 352.

VIII. PRACTICE AND MISCELLANEOUS MATTERS.

See ABSCONDING DEBTOR, 13.—AMENDMENT, III. 3, 4, 5, 9.—ARBITRATION AND AWARD, III(1), 1.—ASSAULT AND BATTERY, 5, 6.—CONTRACT, 1.—DOWER, III. 6.—EJECTMENT, VIII, 15.—JUDGMENT AS IN CASE OF NONSUIT, II. 8.—NEW TRIAL, I; II.—ONUS PROBANDI.

Evidence of hand-writing—Documents unconnected with the cause, inadmissible to refresh witness' memory.]—1. A defendant's counsel, in order to obtain from a witness an opinion as to the hand-writing of the plaintiff's receipt in full to the action, proposed to put into his hands other papers purporting to have been signed by the plaintiff, *but in no way connected with the cause.* The learned judge at Nisi Prius objected to this course, and would not admit of the witness being examined as to the other writings till he had first, from his own recollection of the plaintiff's hand-writing, given an opinion upon the signature of the receipt: *Held*, on motion for a new trial, that the learned judge had properly refused to admit the evidence. *Gleeson v. Wallace*, iv. U. C. R. 245.

[If evidence be rejected at Nisi Prius, the counsel must request the judge to note it, or else he will not be allowed to argue in banc. any question arising out of such evidence, unless the judge's notes shew the point to have been raised at the trial. *Gibbs v. Pike*, ix. M & W. 351.]

Rebutting evidence, making out in fact a new case—How far to go to a jury.]—2. It does not necessarily follow, that because the plaintiff's witness, who has been recalled to rebut the evidence of the defendant, makes statements which in fact amount to setting up a new case on the part of the plaintiff, the judge must therefore refuse to allow such statements to go to the jury. *Devlin v. Crocker*, vii. U. C. R. 398.

[See NEW TRIAL, X. 28.]

Time for admission of evidence generally.]—3. *Semble*, that the precise point of time at which, upon a trial, particular evidence may be introduced, is matter for the judge at Nisi Prius exclusively to determine. *Robinson v. Rapelje*, iv. U. C. R. 289.

Credits.]—4. The plaintiff is not bound by credits given by him in account, on the mere statement of the

defendant, but may reject such credits, unless the defendant can shew that they ought to be allowed. *Gordon v. Fuller*, Trin. Term, 1 & 2 Vic.

Breach of contract—Set-off—Proof of demand.]—5. Though it may be necessary to prove a demand where A. is suing B., as for a breach of contract in not delivering certain goods, &c.; yet where B. is suing A., and A. is setting off his breach against B.'s claim, it does not follow that the same demand must then be proved. *Russell v. Rowe*, vii. U. C. R. 484.

Judge's power to comment on facts judicially known, but not brought out at the trial.]—6. *Semble*, that the judge at the trial, before whom the case in this case had been set aside, after argument in chambers with consent of the parties, as if by the full court in term, and to whom the facts upon which the writ had been set aside had become judicially known, had a right to comment to the jury upon some of those facts, which had been left uncontradicted, as well upon the trial as upon the application in chambers, although such facts had not been again expressly brought out by the plaintiff in his evidence before the jury in this case; however, the facts thus stated by the judge, were afterwards withdrawn by him from the consideration of the jury. *Robertson v. Meyers*, vii. U. C. R. 424.

Interference of court with the discretion of Nisi Prius judge.]—7. Except in case of fraud, the court in banc. will seldom interfere with the discretion of a judge at Nisi Prius, in holding a plaintiff to the case which he has proved, after defects in his evidence have been pointed out. *Armour v. Phillips*, iv. U. C. R. 152.

Improbable statements by plaintiff's only witness, disproving his case.]—8. Where a witness being called to prove the plaintiff's case persists in making positive, though very improbable, statements, disproving it—the

Court, in the absence of any other witness, will not allow the case to go to the jury. (Macaulay, J., dubitante). *Vincent v. Sprague*, iii. U. C. R. 283.

Defendant reads his own letters in address to jury—Right to reply.]

9. Where the defendant read to the jury letters of his own addressed to the plaintiff's attorney, and commented upon them—the Court refused on that ground to allow the plaintiff's counsel to reply. *Alderson v. Stewart*, vii. U. C. R. 297.

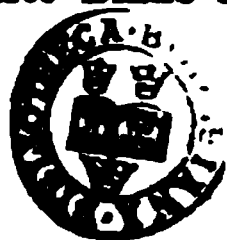
IX. EVIDENCE IN PARTICULAR CASES.

1. *Account stated*—See ACCOUNT STATED.
2. *Administrator*—See EXECUTOR ETC. II. passim.
3. *Aliens*—See ALIEN, 3.
4. *Arbitration bonds*—See ARBITRATION AND AWARD, VI(2), 10, 11.
5. *Assumpsit*—See ASSUMPSIT, II. 8, et seq.—MONEY COUNTS, infra.
6. *Attornies' bills*—See ATTORNEY, III. 3, 8.
7. *Auctions*—See AUCTION AND AUCTIONEER, 2.
8. *Awards*—See ARBITRATION AND AWARD, VI(2), 10, 11.
9. *Bail*—See BAIL, II. 4, (latter part), also, 15.
10. *Bailiffs*—See BAILIFF, 2.
11. *Bankrupts*—See BANKRUPT ETC., 16.
12. *Bills of Exchange*—See BILLS OF EXCHANGE ETC., III. passim; V. 1, 5, 9, 19, 20; VI. 4, 6; VII. 10, 12, 14.—EVIDENCE, V. 5.
13. *Carriers*—See CARRIER, passim.
14. *Case*—See CASE (ACTION ON THE), 2, 9.
15. *Composition with creditors*—See COMPOSITION.
16. *Contracts*—See CONTRACT, 1, 4.
17. *Covenants*—See COVENANT, II(1), 5; II(2), 11, 12.
18. *Crown Grants*—See CROWN GRANT 7, 17.
19. *Customs*—See CUSTOMS ACTS, 5.
20. *Demurrage*—See DEMURRAGE, 2.
21. *Disputed boundaries*—See EJECTMENT, VIII. 22.
22. *Dower*—See DOWER, II. 6, 7, 16, 17.
23. *Ejectment*—See EJECTMENT, II. 11; VIII. passim.—EVIDENCE, II. 4, 8; III. 1.—FORFEITURE, 1.—HEIR, 2, 3.—RECTOR.—TAXES, 3, 4, 5, 12.—TITLE, 11, 12, 13, 15, 18. WITNESS, 25.

24. *Escapes*—See ESCAPE, 3, 7, 8.
25. *Executors*—See EXECUTOR ETC., II. passim.
26. *False Imprisonment*—See FALSE IMPRISONMENT, 8, 9, 10.
27. *Ferry*—See FERRY, 1, 4.
28. *Foreign Judgments*—See FOREIGN JUDGMENT, 2, 4, 5, 7, 11.
29. *Foreign Laws*—See FOREIGN LAW, 1.
30. *Frauds (Statute of)*—See FRAUDS (STATUTE OF), I. 3, 4, 5, 6.
31. *General issue (Evidence under)*—See GENERAL ISSUE, and the cases there referred to.
32. *Goods sold*—See GOODS SOLD, 6.
33. *Guarantees*—See GUARANTEE, 1, 6, 7.
34. *Libel*—See LIBEL AND SLANDER, III.
35. *Limitations*—See LIMITATIONS (STATUTE OF), III. 4, et seq.; IV. 9, et seq.
36. *Malicious Arrests*—See MALICIOUS ARREST, 4, 9, 14, 17, 22.
37. *Malicious Prosecutions*—See MALICIOUS PROSECUTION.
38. *Marriage*—See MARRIAGE, 2, 3, and cases there referred to.
39. *Mesne Profits*—See MESNE PROFITS, 2, 3, 6.
40. *Money Counts*—See MONEY HAD AND RECEIVED, 6, 13.—MONEY LENT.
41. *Payment*—See PAYMENT, 2, 3.
42. *Pedigree*—See EVIDENCE, III. 2.—HEIR, 2.—WITNESS, 24.
43. *Promissory notes*—See BILLS OF EXCHANGE ETC., supra.
44. *Replevin*—See REPLEVIN ETC., 3, 4, 5, 8.
45. *Seals of Corporations*—See CORPORATION, 10.
46. *Seduction*—See SEDUCTION, 12, 13.
47. *Set-off*—See SET-OFF, 12, 15, 18.
48. *Sheriffs*—See SHERIFF, III. passim; V. 19.
49. *Slander*—See LIBEL AND SLANDER, III.
50. *Trespass*—See SHERIFF, III. passim.—TRESPASS, II. passim.
51. *Trover*—See TROVER, II. 3, 4.
52. *Use and Occupation*—See USE AND OCCUPATION, 2, 3.
53. *Usury*—See USURY, passim.
54. *Warranty*—See WARRANTY.

EXCHANGE.

See **BILLS OF EXCHANGE ETC.**, VIII.
2, 3.



EXCISE.

See **CUSTOMS ACTS.**

EXECUTION.

See **ACTION**, 3.—**ALIEN**, 6.—**ATTORNEY**, II(1), 2.—**BANKRUPT ETC.**, 4, 7, 10.—**CAPIAS AD SATISFACIENDUM**.—**COGNOVIT**, 11.—**CORPORATION**, 2.—**COSTS**, VIII. 6.—**DISTRICT COURT**, 2.—**DOWER**, III. 1. **ELEGIT**.—**ESTATE**, 5.—**EXECUTOR ETC.**, I. 4.—**FALSE RETURN**.—**FIERI FACIAS**.—**HEIR**, 4.—**IRREGULARITY**, 14.—**JUDGMENT**, 14.—**NEW TRIAL**, II. 22.—**SCIRE FACIAS**, 4, 5.—**SHERIFF**, I. 1, 10.—**SHERIFF'S SALE**, 2.—**VENDITIONI EXPONAS**.

Execution on judgment for benefit of a third party.—1. The Court will not order that execution shall issue on a judgment for the benefit of a third party, a stranger to that judgment. *Gamble et al. v. Bussell*, Mich. Term, 7 Wm. IV.

Levying debt on one of several defendants.—2. The Court will not restrain a plaintiff from levying the whole of his debt on one of several defendants. *Zavitz v. Hoover et al.*, Mich. Term, 2 Vic.

Execution attaches on goods in custody without seizure.—3. Where goods are already in the custody of the law, a writ of fi. fa. at once attaches upon them, without an actual seizure. *Beekman v. Jarvis*, iii. U. C. R. 280.

Action in debt—Cognovit in assumpsit—Execution thereon.—4. The Court will not set aside an execution upon the ground that the action was commenced in debt and the cognovit given in assumpsit. *Brown v. Waldron*, Tay. U. C. R. 679.

Setting aside execution having priority, on motion of strangers.—5. Where there were several executions against the goods of a debtor and there was a defect in the proceedings of the execution creditor, who was entitled to priority, which might have been sufficient to have set them aside on the motion of the debtor,—the Court refused to set them aside on the application of the subsequent execution creditors, made for the purpose of obtaining priority for their writs of execution, without the knowledge or consent of the debtor. *Farr v. Arderly*, i. U. C. R. 337.

Staying proceedings, plaintiff having fled the province.—6. Where the plaintiff obtained judgment against the defendant ten years ago, and two or three years afterwards fled from the province charged with a criminal offence, and a writ of execution had been issued on the judgment without any leave of the Court, or notice to the party,—the Court made a rule absolute to stay the proceedings. *Hobson v. Shand*, iii. U. C. R. 74.

Sued out by assignee in the name of the assignor.—7. A. obtains a judgment against B. on his bond, and after this assigns the judgment to C. for valuable consideration. C. issues a writ against B.'s lands in the name of A. B. applies to set the writ aside—the Court discharged the application. *Commercial Bank v. Boulton*, vi. U. C. R. 627.

Irregularity—Waiver.—8. It is an irregularity only, and not a nullity, to issue an alias fi. fa. after a return of "goods on hand" to the original fi. fa., and a ven. ex. upon it, on which the sheriff returns "that the goods had been exhausted by prior writs;" and the irregularity is waived by the application against it not being made in due time. *The Commercial Bank v. McDonnell et al.*, i. U. C. R. 406.

[See **IRREGULARITY**, 14.]

Priority.—9. In determining the priority of writs, the Court will look

to the fraction of a day. *Beekman v. Jarvis*, iii. U. C. R. 280.

Spent execution.]—10. Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what had been commenced while it was in force. *Doe dem. Greenshields v. Garrow*, v. U. C. R. 237.

Different species of estates and interests liable to execution.

Equity of redemption.]—11. An equity of redemption in a term of years cannot be sold on an execution. *Doe dem. Webster v. Fitzgerald*, Easter Term, 2 Vic.

[The statute 12 Vic. ch. 73, passed since this decision, enacts generally that the interest of a mortgagor may be seized on an execution against lands.]

Interest of mortgagee.]—12. After a mortgage in fee has become forfeited by the non-payment of the mortgage money, the mortgagee's interest in the mortgaged premises cannot be sold under an execution against lands. *Doe dem. Campbell v. Thompson*, Hil. Term, 6 Vic.

Lands of testator on judgment against executor.]—13. Lands and tenements held in fee simple by a debtor at the time of his decease, may be legally taken in execution on a judgment against his executor or administrator. *Forsyth v. Hall*, Dra. Rep. 304.

[See EXECUTOR ETC., III. 3, 4, 5, 6, 7.]

Sale of debtor's possession of lands under fi. fa. goods.]—14. Mere possession of land by a debtor constitutes prima facie a seizin in fee, and such an estate cannot be sold under an execution against goods and chattels. *Doe dem. Keogh v. Calhoun*, i. U. C. R. 157.

Rights of entry not liable.]—15. The sheriff under an execution against lands can only sell the debtor's interest in possession, whatever that interest may be; he cannot sell the debtor's mere right of action while a third party

is in adverse possession of the land. *Doe dem. Ausman et al. v. Minthorne*, iii. U. C. R. 423.

Term of years.]—16. A term of years cannot be sold under an execution against lands and tenements. *Doe dem. Court v. Tupper et al.*, Trin. Term, 1 & 2 Vic.

Trust estate.]—17. A., the assignee of a certain leasehold property, makes an assignment to B., upon an understanding that he is to hold the property only as his agent till his return from the United States. A. returns, and directs B. to assign the same to C., which he does. D. having an execution against the goods of A., purchased A.'s interest in the lease at the sheriff's sale: *Held*, in an action of ejectment, brought by D. to recover possession from C., that A. had no estate which could be sold by the sheriff, and that a verdict should be entered for the defendant C. *Doe dem. Simpson v. Privat*, v. U. C. R. 215.

Sale of rent charge under a fi. fa. goods.]—18. A rent charge issuing out of, and chargeable upon a freehold estate, and granted to a person for his life, is not subject to be seized and sold as a chattel, under a writ of fi. fa. against goods. *Smith v. Turnbull*, v. U. C. R. 586.

Abandonment of seizure.]—19. The sheriff, on the 15th of April 1835, received a writ of fi. fa. against lands, and on the 10th of May 1836 he sold some of the defendant's lands under it; other portions of the land, though included in the sheriff's advertisement published previously to that sale, were not sold. There being no adjournment of the sale, or any postponement from time to time, or any new advertisement, the sheriff, in December 1838, suddenly takes up this old writ, issued in 1835, and proceeds to sell under it the lands unsold in 1836: but held, that the seizure under the writ of 1835 must be considered as abandoned, and the sale of 1838 void. *Doe dem.*

Cameron v. Robinson et al., vii. U. C. R. 335.

Right of execution creditor, when debt satisfied, to assist sheriff's vendee by issuing alias fi. fa.]—20. Where the execution creditor had been paid his debt in full in 1840, by the assignee of the sheriff's vendee of land sold under a fi. fa. lands—the Court, upon the facts given in the report, set aside an order in chambers, obtained by the attorney for the assignee, and, as if at the instance or with the consent of the execution creditor, for the issuing a fi. fa. lands in 1849 against the execution debtor, holding that it was not competent for the execution creditor at that distance of time to elect to consider his debt unsatisfied, and to act upon the assumption that the person who paid it did not make the payment in privity with his debtor. *Bank of Upper Canada v. Murphy*, vii. U. C. R. 328.

Estate reverting from trustees.]—21. Where real property is conveyed to trustees for sale for the satisfaction of debts, so as the sale be made within a certain period, and the sale be not made within that time, no use results back to the grantor which can be taken in execution for his debts under the Statute of Frauds. *Doe dem. Laurason v. The Canada Company*, Trin. Term, 5 & 6 Vic.

Interest of reversioner.]—22. The interest of a reversioner may be sold under a fi. fa. against lands, during the life-time of the tenant, for life. *Doe dem. Cameron v. Robinson et al.*, vii. U. C. R. 335.

[As to the interests in land that may now be seized and sold in execution, see statute 12 Vic. ch. 71, sec. 13, extended by 14 & 15 Vic. ch. 7, sec. 9.]

EXECUTOR AND ADMINISTRATOR.

- I. RIGHTS AND LIABILITIES.
- II. PROCEEDINGS BY.
- III. PROCEEDINGS AGAINST.

I. RIGHTS AND LIABILITIES.

See ARBITRATION AND AWARD, VI (1), 6.—BILLS OF EXCHANGE ETC., IV. 11, 19.—BOND, I. 6.—CAPIAS AD SATISFACIENDUM; 4.—COSTS, II. 4.—DISTRESS, I. 12.—EJECTMENT, VIII. 6.—EXECUTION, 13.—LEGACY.—LIMITATIONS (STATUTE OF), III. 5, 6.—MONEY HAD AND RECEIVED, 1, 10.—SHERIFF, V. 4, 15.—TRUST AND TRUSTEE, 1, 2.—WILL, 7.

Grant of probate by the Court of Canterbury, no authority to sue here.]—1. Probate of a will granted by the Court of Canterbury, gives no title to an executor to sue for a cause of action accruing in this country, the testator having died here. The executor cannot maintain an action without producing letters testamentary, granted by the proper authority in this province. *White v. Hunter*, i. U. C. R. 452.

Executor of deceased partner, tenant in common with surviving partners.]—2. The executor of a deceased partner in trade is tenant in common with the surviving partners of the partnership property, and the surviving partners cannot sue him in trespass for a wrongful sale and conversion of the whole of the partnership property against their will. *Strathy v. Crooks*, ii. U. C. R. 51.

Executors empowered to dispose of lands for payment of debts.]—3. Plaintiff declared in indebitatus assumpsit; the defendant pleaded plene administravit except as to the 20^l. The plaintiff replied admitting that the defendant had not any goods or chattels, except &c., yet that the testator died seized of lands, and that the said lands &c. were at the testator's death, and when suit brought, assets in the hands of the defendant as executor, and liable to satisfy the plaintiff's damages. Demurrer to replication, on the ground that executors had no control over lands, or could not as executors

dispose thereof: *Held*, replication good. *Seaton v. Taylor*, iii. U. C. R. 302.

Construction of will—Vesting of estate tail—Liability for debts.]—4. A devise to a son of the testator and “his heirs forever, and in failure of male heirs begotten by him to the heir-at-law of another son,” gives an estate tail to the first son, and when the devise was of lands of the Crown, of which the testator was merely the nominee, but after his death a grant issued for them to the first son and his heirs to the uses of the will of the testator: *Held*, that the will should be construed as if the testator had possessed the legal estate, and that as the first named son was only tenant in tail, the lands could not be sold in the hands of his executors for his debts. *Doe dem. Butler v. Stevens*, Mich. Term, 3 Vic.

A promise to a third party enuring to the benefit of an administrator de bonis non.]—5. An express promise to pay made by the defendant to a third party, may enure to the benefit of the plaintiff, an administrator de bonis non with the will annexed, though at the time of such promise the plaintiff had not obtained letters of administration. *Beard v. Ketchum*, vi. U. C. R. 400.

Right to recover money from son intended for other children.]—6. Where a father intending in the distribution of his property to give his son one hundred acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying 125*l.* for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family, and the father then for a nominal consideration conveyed to the son the land received in exchange: *Held*, that the executors of the father might maintain an action against the son for the 125*l.* as money paid to his use; that they were not estopped by the consideration stated in

the deed, and it was not for an interest in lands within the Statute of Frauds. *McBride et al. v. Parnell*, iv. O. S. 152.

Money had and received.]—7. Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors as money had and received to the use of the testator. *Smart et al. v. Brown*, Easter Term, 2 Vic.

Misconduct by executor in securing his own debt.]—8. A testator who was indebted to the defendant appointed him his executor, and he being desirous of securing his own debt, made an arrangement with the plaintiff, to whom the testator had owed nothing, to confess a judgment to him, that an execution might issue against the lands of the testator in the defendant's hands as executor, and that the plaintiff should pay the proceeds arising from the sale to the defendant for his debt, and a confession having been given and execution issued in pursuance of this arrangement, the Court, on the application of the tenant of the land, set aside all the proceedings with costs. *Bonistiel v. McMasters*, Mich. Term, 3 Vic.

Executors personally liable for costs.]—9. Where executors employ an attorney, they are personally responsible to him for the costs. *Dickson et al. v. Crooks et al.*, Mich. Term, 4 Vic.

[See their right to recover costs—Costs, II. 4.]

Covenant in conveyance personally binding on executors.]—10. Where executors conveyed land as executors under a power of sale in the will of testator, but entered into a covenant for themselves, their heirs, &c., in the deed, for good title: *Held*, that they were personally liable on that covenant, and that the grant by them as

executors could not control their express contract. *McDonald v. McDonnell et al.*, Hil. Term, 4 Vic.

Liability of executors of a deceased joint contractor when the other living.—11. Where in an action of assumpsit on a contract against executors they pleaded that the cause of action accrued in Scotland, against their testator and one A. jointly; that A. is still living, and that by the law of Scotland where the contract was made, if one of the parties to a joint contract die, his personal representatives are discharged,—the plea was held bad on general demurrer, as by our provincial statute 1 Vic. ch. 7, the personal representatives of a joint contractor are made liable notwithstanding the survivorship of the other, and the *lex loci contractus* applies only to the contract, and not to the remedy. *Gilmore v. Crooks et al.*, Hil. Term, 6 Vic.

[Also see FOREIGN JUDGMENT, 8.]

Liability of executors of sureties on defalcation of principal.—12. The executors of sureties are liable for the defalcation of the principal, committed after the death of their testator, and even after notice given by the executors that they would not be liable. *Regina v. Leeming et al.*, vii. U. C. R. 306.

II. PROCEEDINGS BY.

See ARBITRATION AND AWARD, VI (1), 7.—BAIL, II. 14.—EJECTMENT V. 4.—LIMITATIONS (STATUTE OF), IV. 9.—MONEY HAD AND RECEIVED, 1, 10.—SCIRE FACIAS, 3.—SET-OFF, 5.

Statement of cause of action.—1. Where a plaintiff sues in a representative character, the cause of action must be stated in the declaration to have accrued to him as such representative. *Hawn et al. v. Madden et al.*, Easter Term, 2 Vic.

Action by surviving executors—Declaration.—2. Where one of three

executors is dead, and the survivors bring an action in right of their testator, the declaration must state that payment has not been made to the deceased executor. *Nichall et al. v. Williams*, Tay. U. C. R. 20.

Necessity for executors to produce probate in actions by them.—3. An executor suing for a cause of action after the death of his testator must, under the general issue, produce the probate of the will; but where, on the general issue pleaded to a declaration containing counts for a cause of action in the time of the testator, as well as since his death, both causes of action were proved but no probate was produced, it was held that the production was unnecessary, as it appeared on the record, from a verdict being found for a cause of action in the time of the testator, that the plaintiffs were executors. *McGill et al. v. Bell et al.*, iii. O. S. 618.

4. Where the plaintiffs declared as executors, laying promises to the testator in his life-time, promises to the plaintiffs as executors after his death, and on an account stated with the plaintiffs as executors—the Court held that it was not necessary to produce probate to prove their representative character. *Dickson et al. v. Markle*, Dra. Rep. 298.

Action by administrator—Plea of ne unques administrator.—5. Where a plaintiff in his declaration styled himself as administrator of A., and laid promises to himself administrator aforesaid, but did not aver any debt or promise to himself as administrator, nor make any profert of letters of administration—a plea of ne unques administrator was held bad on general demurrer. *Walker v. Court*, Hil. Term, 6 Wm. IV.

Bond to executors, how to sue thereon.—6. On a bond given to executors, they may sue either as executors or in their own right. *Davis (executors of) v. Davis*, Trin. Term, 1 & 2 Vic.

Production of letters of administration.—7. Upon the issue of ne unques administrator, the plaintiff, producing such letters of administration as he has pleaded, will be entitled to succeed. If the letters of administration do not give the plaintiff a right to sue, by reason of anything extrinsic, such as the place of residence of the defendant, &c., the extrinsic fact must be pleaded specially. Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator. *Beard v. Ketchum*, v. U. C. R. 114.

[Grant of administration relates back to the death of the testator, for several purposes.—*Foster v. Bates*, xii. M. & W. 226; *Thorpe v. Stallwood*, 5 M. & G. 760; *Whitehead v. Taylor*, 10 Ad. & Ell. 210; *Patten v. Patten*, 1 Alc. & Nap. 493.]

Averments of promise to plaintiff, administrator de bonis non—General issue—Evidence.—8. The plaintiff, as administrator, sues the defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. The defendant pleads that he did not promise in manner and form, &c. Upon the trial it was proved by a witness, not shewn to have been the plaintiff's agent, or in any way privy to the cause of action, that he came from the United States in 1842, to speak to the defendant about these notes; that the defendant then said to him, "Get me the large note you spoke of and shew that to me and I will pay the whole;" that he brought him the note when he came the second time, in 1844, and after much discussion the conversation ended in the defendant saying, that he, the witness, must see a third party to whom this defendant referred, intimating that he would not engage to pay until something had been ascertained through this reference; that he (the witness) made the reference to this third party, that nothing resulted from the interview, and that an action was therefore brought:

Held, upon these facts, (Jones, J., dissentiente), that if the admissions to the witness could be construed into an absolute promise to pay, still being made before the plaintiff had received his letters of administration, they could not support the issue raised. *Ib.*

9. *Quære*: Do the admissions in evidence support an absolute promise to pay, supposing them to have been made to the administrator himself? and if they do, does the fact of their being made to the witness, instead of to the administrator, make any difference? *Ib.*

III. PROCEEDINGS AGAINST.

See AMENDMENT, III. 13.—ARBITRATION AND AWARD, VI(1), 6.—ARREST OF JUDGMENT, 7.—BILLS OF EXCHANGE ETC., V. 14.—JUDGMENT, 13.—LEGACY.—NEW TRIAL, X. 17, 18.—NOLLE PROSEQUI, 3.—PAYMENT INTO COURT, 2.—PLEADING, III. 8.—SET-OFF, 11.

Husband and wife executrix—Service of process on husband.—1. Where husband and wife executrix are sued, service of process on the husband only is sufficient, as well as in other cases. *Shuter et al. v. Marsh et ux.*, Tay. U. C. R. 224.

Estoppel from pleading plene administravit.—2. An executor is estopped from pleading plene administravit to a declaration on a sci. fa., to revive a judgment against himself, and the nature of such judgment appearing on the face of the declaration, the plea is bad on demurrer. *Wood v. Leeming et al.*, ii. O. S. 508.

Lands, how far assets for payment of debts.—3. *Semble*: That a fi. fa. cannot issue against lands and tenements of an intestate, as being assets in the hands of an administrator. *Doe dem. Ruggles v. Carfrae*, Tay. U. C. R. 281.

[But see the following cases.]

4. Lands are assets for the satisfaction of debts in the hands of an executor,

under Geo. II. ch. 7; and to a plea of plene administravit, the plaintiff may reply lands. *Gardiner v. Gardiner*, ii. O. S. 520.

5. The plaintiff declared in indebitatus assumpsit. The defendant pleaded plene administravit, except as to 20*l*. The plaintiff replied, admitting that the defendant had not any goods or chattels, except, &c., yet, that the testator died seized of lands, and that the said lands, &c., were, at the testator's death, and when suit brought, assets in the hands of the defendant, and liable to satisfy the plaintiff's damages. Demurrer to replication, on the ground that an executor had no control over the lands, or could not as such executor dispose of them: *Held*, replication good. *Seaton v. Taylor*, iii. U. C. R. 303.

[See replication of lands, 11 and 12, *infra*.]

6. *Semble*: That lands may be sold under a judgment confessed by an executor; that lands can be sold upon a judgment execution against the personal representatives of the testator, under the imperial statute 5 Geo. II. ch. 7, is a point not now open to discussion before the Court. *Doe dem. Lyon v. Lege*, iv. U. C. R. 360.

7. The lands of a testator may be sold on a judgment against one of several executors, in the same manner as if the judgment had been against all. *Doe dem. Smith v. Shuter et al.*, Trin. Term, 1 & 2 Vic.

Assets—Priority of payments.]

8. In payment of debts, a mortgage not due must be preferred before simple contract debts, and the plaintiff may shew that simple contract debts have been first paid, under the replication of assets in hand when action brought, and need not reply specially. *Forsyth et al. v. Johnston et al.*, Trin. Term, 3 & 4 Vic.

Plea of submission to arbitration.]

—9. A plea stating that defendants, executors as aforesaid, submitted to

arbitration, does not imply that they submitted in their character as executors. *Bleeker v. Myers et al.*, Tay. U. C. R. 387.

Assumpsit against—Plea of outstanding judgments—Pleading.]

10. In assumpsit against an executrix, she pleaded that there were judgments outstanding, one against the testator in favor of A. for 2000*l*., and another against the defendant as executrix, and that she had fully administered, except as to the value of 50*l*., which sum was not sufficient to satisfy the judgments; and the plaintiff replied that after notice, and before plea, only 800*l*. remained due on A.'s judgment, and that A. was willing to enter satisfaction thereon, on payment of that sum, and that the defendant as executrix had refused to pay it, and allowed A.'s judgment to remain for the purpose of defrauding the plaintiff; and that the defendant, after the commencement of the action, and before plea, had sufficient assets to satisfy A.'s judgment, and also the plaintiff's damages; and, to the judgment against the executrix, nul tiel record, and concluding with a verification: *Held*, on special demurrer, shewing for cause that the conclusion by verification was wrong, and the replication double, for replying to both judgments in the same replication, that the conclusion was right, and that the plaintiff could properly reply to both subsisting judgments, and that the defendant could not have traversed the amount alleged to be due on the plaintiff's replication, the gist of the replication being that the judgment of A. was upheld by fraud. *Burrows v. Washburn*, Easter Term, 3 Vic.

Plea of outstanding judgment, and plene administravit—Replication, lands.]

11. Where in an action against an executor he pleaded a judgment recovered against him as executor, and plene administravit præter 5*l*., and the plaintiff replied lands of the testator, but did not aver that the lands

were remaining when action brought, and neither confessed nor denied the judgment alleged in the plea—the replication was held bad on special demurrer. *Bowes v. Johnson*, Trin. Term, 4 & 5 Vic.

12. In an action against an administrator, if the defendant plead plene administravit, and the plaintiff reply that the administrator had lands of the intestate in his hands to be administered, of which he could and might and ought to have satisfied the damages, &c.—the replication is bad on special demurrer. *Ward v. McCormack*, Easter Term, 5 Vic.

Uncertain plea.—13. In assumpsit against an executrix, she pleaded that the testator duly made his will in writing and appointed the plaintiff and one G. S. B. his executors, and afterwards died without altering the will, the plea was held bad on special demurrer. *Graham v. Elliott*, ii. U. C. R. 436.

Averment of promise—Immaterial issue.—14. The plaintiff sues the defendants, as executors of a testator, the indorser of a note which had not become due till after the decease of the testator; he avers due notice to the executors of the dishonor of the note, and then states that by reason thereof they became liable to pay the amount of the note, and being so liable, they afterwards, as executors, promised to pay on request. The defendants plead as to so much of the declaration as alleges that they promised to pay the plaintiff &c., that they did not promise &c.: *Held*, on demurrer to plea, plea bad, as raising an immaterial issue, the promise of the executors to pay being implied from the facts averred in the declaration and not denied in the plea. *Masson v. Hill et al.*, v. U. C. R. 60.

[See necessity for the averment of promise in an action against an executor—*BILLS OF EXCHANGE ETC.*, V. 14.]

EXECUTOR DE SON TORT.

Mixed question of law and fact.]

—1. Whether a party has made himself an executor de son tort is a mixed question of law and facts. The jury must in the first place find the facts if disputed, and the Court are to say whether those facts create an executorship. *Haacke v. Gordon*, vi. U. C. R. 424.

Defending actions as executor.]

2. A party may make himself an executor de son tort by answering as executor to any action brought against him, or by pleading any other plea than *ne unques executor*. *Ib.*

EXEMPLIFICATIONS.

See CROWN GRANT, 1, 13.—FOREIGN JUDGMENT, 5.

EXHIBITS.

See EVIDENCE, IV. 3.

EXIGENT.

A writ of *exigi facias* will be ordered by this Court upon the application of the prosecutor without its being applied for by the Attorney General. *Rez v. Elrod*, Tay. U. C. R. 152.

EXONERETUR.

See BAIL, I. 4, 9, 10, 11.

EX-SHERIFF.

See FALSE RETURN, 10.—SHERIFF, II. 17, 20.—SHERIFF'S SALE, 13, 14, 15, 16, 17, 18.

EXTRA WORK.

See CONTRACT, 8, 9.—PLEADING, II. 32.

FALSE IMPRISONMENT.

See CONSTABLE, 1.—COSTS, VII. 7.
MAGISTRATES, 7.—NEW TRIAL,
IV. 5, 11.—SHERIFF, I. 15.—TRES-
PASS, II. 1, 2, 21.

Action against sheriff on second surrender of a debtor.]—1. Where a debtor on the limits on a writ of *capias ad satisfaciendum* issued out of a district court, was brought by his bail for surrender to the sheriff, who refused to receive him except at the gaol, but gave a certificate which was taken away by the bail that the gaoler might receive him, and the bail did not then surrender him, but some time after (the debtor in the mean time having gone off the limits) gave him up to the sheriff, who kept him in close custody until he was discharged by an order of the judge of the district court: *Held*, that an action for false imprisonment would not lie against the sheriff for taking the debtor on the second surrender, the first having been conditional, and the condition not complied with, and the escape having been negligent and not voluntary. *Thompson v. Leonard*, iii. O. S. 151.

Justification under mesne process from district court.]—2. In a plea justifying an arrest under mesne process of a district court, the cause of action should be averred within the jurisdiction, and the writ shewn to be returned. *Bigcraft v. Clarke*, iv. O. S. 132.

3. It should also be averred that an affidavit for a sum certain was made and filed, to warrant the issuing of the process; and a replication that no such affidavit was made and filed does not contain a negative pregnant. *Ferris et al. v. Dyer*, Hil. Term, 6 Wm. IV.

4. In trespass for false imprisonment a plea justifying under district court process, which had been set aside for irregularity on the terms of no action being brought, cannot be sustained. The defendant should have applied to

stay proceedings. *Ferris v. Dyer et al.*, iv. O. S. 182.

Justification under an illegal warrant.]—5. Where in trespass for false imprisonment, the defendant justified under a warrant from the president and Board of Police at Cobourg, under the Cobourg Police Act, for the non-performance of statute labor by the plaintiff, and after alleging summons, appearance, conviction and warrant of distress, averred that he had made part of the sum directed to be levied, and that the plaintiff had no more goods, and thereupon justified under a warrant to imprison for the remainder of the penalty for twelve days absolutely, and not unless the fine and costs should be sooner paid—the justification was held bad because the plaintiff was imprisoned after part of the fine had been paid; and the warrant to imprison being for an absolute time, without any reference to the earlier payment of fine and costs, was illegal and void. *Trigerson v. Board of Police of Cobourg*, Easter Term, 5 Vic.

Justification under Hawkers' and Pedlars' Act.]—6. In an action of trespass for false imprisonment, a plea justifying the arrest, as a constable, without a warrant under the Hawkers' and Pedlars' Act, 58 Geo. III. ch. 5, for pedling without license, must shew that the plaintiff was *found trading* at the time of the arrest, and that the defendant took him before the nearest justice of the peace. *Oviatt v. Bell*, i. U. C. R. 18.

Omission of conviction in warrant—Liability of justice.]—7. Omitting to state the conviction of a defendant in his warrant of commitment will not subject a justice of the peace to an action for false imprisonment, provided the actual conviction be proved upon his defence. *Whelan v. Stevens*, Tay. U. C. R. 328.

Justification under warrant—General issue.]—8. The sheriff sued in trespass for false imprisonment in

having arrested the defendant under a warrant issued by the justices of the peace sitting in quarter sessions, may give this justification in evidence under the general issue. *Fraser v. Dickson*, v. U. C. R. 231.

Plea justifying under ca. sa.—Replication that ca. sa. set aside—Evidence.]—9. The plaintiff sued in trespass for false imprisonment; the defendant justified under a writ of al. test. ca. sa. The plaintiff replied that after the said writ issued, and before action brought, the writ was set aside by order of the Court; and he then proceeded in his replication to state the grounds upon which the Court had set aside the writ.—The defendant rejoined, that it was not ordered that the said writ should be, and that the same was not set aside in manner and form as the plaintiff alleged: *Held*, that under these pleadings, the setting aside of this writ being in itself an answer to the defendant's justification, it was not incumbent on the plaintiff at the trial to go further and prove that the grounds alleged in his replication were the grounds upon which the writ had been set aside. *Robertson v. Meyers*, vii. U. C. R. 423.

Evidence of facts previous to arrest.]—10. In an action of trespass for false imprisonment, where the defendant justified under a writ of ca. sa., and the plaintiff replied that it had been set aside before action brought, the judge at Nisi Prius allowed the plaintiff to go into evidence of facts and circumstances previous to the arrest, with a view of shewing the oppressive conduct of the defendant in issuing the ca. sa.: *Held*, upon a rule for a new trial, that such evidence was admissible as affecting the damages, though not the right of action. *Ib.*

Nisi Prius—Reading judgment of court when ca. sa. set aside.]—11. *Held* also, that the counsel for the plaintiff had a right to read at the trial, from the original judgment of the court

in discharging the plaintiff from arrest and setting aside the ca. sa., the grounds upon which the ca. sa. had been set aside. *Ib.*

FALSE REPRESENTATION.

See CASE (ACTION ON THE), 6.—CONTRACT, 3.

FALSE RETURN.

See DISTRICT COURT, 12.—SHERIFF, V. passim.—VENDITIONI EXPONAS, 5.

Plaintiff settling suit and afterwards suing for.]—1. Where a writ of fieri facias was placed in a sheriff's hands against the goods of the defendant, who was in possession of property in his district at the time, and a levy was made, but the plaintiff afterwards compromised with the defendant, receiving payment of his debt by instalments, but giving no directions to the sheriff to discharge the defendant's property: *Held*, that on a return of nulla bona by the sheriff several months afterwards, when the defendant had absconded without satisfying the balance of the debt, the plaintiff could not sue for a false return, as he was precluded by the arrangement which he had made with the defendant. *Everingham v. Leonard*, iii. O. S. 121.

False return to a fi. fa., ca. sa. subsequently issued no defence.]—2. To an action against a sheriff for a false return of nulla bona to a writ of fi. fa., the bare fact that the plaintiff after such return sued out a ca. sa. will be no defence, unless it be further averred in the plea, that the plaintiff accepted the return of nulla bona with a knowledge at the time that it was false. *Boys v. Ruttan*, vi. U. C. R. 263.

Action—Plea of no fi. fa. according to law.]—3. In an action against a sheriff for a false return, a plea that no writ of fieri facias issued upon the

judgment according to law, is bad on special demurrer. *Upper v. Hamilton*, i. U. C. R. 467.

[See also case 13, *infra*.]

Return of part—Declaration alleging the whole made—Plea, that none made.—4. To a declaration for a false return, alleging that the sheriff made the money, but returned that he had made fifteen pounds, and no more, it is a bad plea that the sheriff did not seize nor levy any money, as he is precluded by his return as to fifteen pounds, but to an averment that the sheriff made all the money and did not pay it over, such a plea would be good. *Ib.*

Plea, that a certain sum was made and paid over.—5. It is also a good plea to a breach, that the sheriff made the money in the writ and did not pay it over, that the sheriff made a certain sum which he paid over; and it is not necessary to shew to that breach that the defendant had no goods whereof the residue could be made; although to such a breach it is a bad plea, that the sheriff was instructed to make a certain sum, and that he made that sum and no more, or that the writ was not returned as alleged in the declaration. *Ib.*

Writ against two defendants—Action—Plea of no goods.—6. To an averment of a false return to a writ against the goods &c. of two defendants, a plea that they had not any goods, is bad on special demurrer—it should deny that *either* of them had any goods. *Ib.*

Attaching creditors—Priority of executions.—7. Where attachments were issued against an absconding debtor, and the last attaching creditor having obtained execution first, the sheriff afterwards returned nulla bona to the execution of the first attaching creditor: *Held*, that he was liable for a false return, the first attaching creditor being entitled to priority. *Gamble*

et al. v. Jarvis, Trin. Term, 6 & 7 Wm. IV.

[See statute 5 Wm. IV. ch. 5, sec. 6.]

Directions to sheriff not to sell unless he receive another execution.]

—8. Where writs of fieri facias against the goods of a defendant were placed in the hands of a sheriff by several plaintiffs, with directions to levy but not to sell unless another execution against the goods of the defendant was delivered to him, and having received another execution returnable the same term as the former executions, he returned it nulla bona and sold under the first: *Held*, that the sheriff was liable to an action for a false return, the directions by the first execution creditors being fraudulent as to the subsequent creditors, and the first executions thereby losing their priority. *Ross et al. v. Hamilton*, Easter Term, 3 Vic.

[See also case 11, *infra*.]

Priority between fi. fa. and commission of bankruptcy.—9. Where a creditor has placed his writ of fi. fa. in the sheriff's hands, and before any actual seizure by the sheriff under the fi. fa., and before the return day of the writ, the goods of the debtor are seized under a commission of bankruptcy, and "nulla bona" returned to the writ, the sheriff is liable on such return to an action at the suit of the execution creditor. *Decatur v. Jarvis*, iii. U. C. R. 133.

Liability of a sheriff for returns after resignation, but before successor appointed.—10. A writ of fi. fa. was delivered to the sheriff on the 21st of November 1847, returnable in Hilary Term 1848. On the 9th of December 1847, the sheriff tendered to the government his resignation of office. On the 14th of the same month it was notified to him that his resignation had been accepted; but his successor had not been appointed till after the return of the writ, which was made in the interval. The deputy sheriff, who remained in the office to wind up the old

business, made his return to the writ; and in an action against the sheriff for a false return it was held, that under the facts proved, the sheriff must be considered in office at the return of the writ, and liable upon the return made. *Ross et al. v. McMartin*, vii. U. C. R. 179.

Special instructions—Priority of executions.—11. Where in an action against a sheriff for a false return to an execution against goods, the plaintiff averred that he delivered his writ to the sheriff with instructions not to proceed upon it until some other writ of execution against the goods of the same defendant should come into his hands; that another writ did come into his hands; that the sheriff seized and sold under both writs and made sufficient money to satisfy both, but falsely returned that proceedings had been stayed on the plaintiff's writ, and that he could not in consequence make the money—the declaration was held good on general demurrer. *Strange v. Jarvis*, Trin. Term, 4 & 5 Vic.

Compromise by sheriff with debtor.—12. Where in an action on the case against a sheriff for a false return to a writ against goods, a letter was put in from the sheriff to the plaintiff's attorney saying that he levied under the execution on goods claimed by others, and that he had in consequence compromised and agreed to secure the amount of the execution in two instalments at early dates, but the sheriff afterwards returned "no goods," and on the trial the execution debtor and her son-in-law proved that the property had been transferred to the son-in-law but remained in the possession of the debtor, and the jury found a verdict for the plaintiffs, the Court refused a new trial. *Mead et al. v. Hamilton*, ii. U. C. R. 135.

Plea of no writ duly sued out and duly returned.—13. A plea by the sheriff to an action for a false return to a writ of fi. fa., set out in the decla-

ration that there was no writ against A.'s goods *duly* sued out and *duly* returned, is bad. *Grantham v. Jarvis*, vi. U. C. R. 511.

Plea of no seizure of goods.—14. A plea by a sheriff that he did not seize any of the plaintiff's "goods" without adding "or chattels," is good on special demurrer. *Ib.*

FEE SIMPLE (ESTATE IN).

See ESTATE, *passim*.

FEEES.

See ATTORNEY, III.—CLERK OF THE PEACE, 1, 2.—COSTS—COUNSEL, 1. DEED, III. 20, 21.—WITNESS, 2.

FELONY.

See ARREST, IV. 11.—CRIMINAL LAW.—MAGISTRATES, 1.

FEME COVERT.

See ABATEMENT, 5.—ADMINISTRATION BOND, 4.—DEED, II. 4, to 10, inclusive.

FENCES.

See PLEADING, II. 11.

Application of 4 Wm. IV. ch. 12.—1. The statute 4 Wm. IV. ch. 12 for regulating line-fences, does not apply to cases where there is an express agreement existing between the parties. *Lane v. Mulholland et al.*, Easter Term, 6 Wm. IV.

Trespass for impounding cattle—Plea, damage feasant—Replication, fences out of repair.—2. Trespass for taking, impounding and selling plaintiff's horses.—Plea, that the horses were damage feasant.—Replication, that by town meeting regulations fences should be five feet high, and

that the defendant's fence not being that high, but ruinous and out of repair, plaintiff's horses escaped out of his close into the defendant's close, without the knowledge or consent of the plaintiff: *Held*, good on general demurrer. *Ives v. Hitchcock*, Dra. Rep. 254.

Cattle—Necessity for fences.—3. A land owner in this country must fence against cattle. *Spafford v. Hubble*, Mich. Term, 2 Vic.

FENCE VIEWERS.

Award.—On the question of the sufficiency of a fence according to township regulations where, cattle are distrained damage feasant, the award of fence viewers is conclusive. *Stedman v. Wasley*, Easter Term, 4 Vic.

FERRY.

Case for disturbance—Evidence.—1. In an action on the case for disturbing plaintiff's ferry, it is not necessary to prove that the defendant either received or claimed any hire or payment. *Burford v. Oliver*, Dra. Rep. 8.

Power of government to grant a right of ferry on rivers separating Canada from the United States.—2. The government of this country has power to grant a right of ferry on rivers which form the division line between Canada and the United States, and a person to whom such a right is granted, may maintain an action against any one who disturbs his ferry, on the waters over which the British government has jurisdiction. *Kirby v. Lewis et al.*, Mich. Term, 5 Vic.

Proof of right.—3. A letter from the governor's secretary, authorizing a person in the name of the government to take possession of a ferry, is not sufficient to establish his right to the ferry, so as to enable him to maintain

an action for its disturbance. *Jones v. Fraser*, Trin. Term, 5 & 6 Vic.

[Reputation is evidence of a right to ferry. *Pim v. Curell*, vi. M. & W. 234.]

Parties to sue for disturbance.—4. If, in an action for the disturbance of a ferry it be shewn that the ferry is under the management of a third person, who receives the ferriage for his own benefit by agreement with the plaintiff, the plaintiff cannot recover. *Ib.*

Right to use private boats within the limits of a ferry.—5. The provincial act, 9 Vic. ch. 9, sec. 1, as well as the common law, authorizes a person to use his own boat within the limits of a ferry, in the pursuit of his business or pleasure, freely and without any necessity of shewing the particular motives or occasions he may have for allowing any individual to to pass in his boat, provided such person be not a traveller, and provided nothing be charged for carrying. *Ives et al. v. Calvin*, iii. U. C. R. 464.

Parties to sue for disturbance.—6. The Crown grants a right of ferry to A., who leases by writing not under seal to B.—C. disturbs the right of ferry, and B. brings an action on the case against C. for such disturbance; but held, that the plaintiff B. must be non-suited, the right to sue being in A. the grantee of the franchise, and not in B., who, if he be interfered with, must look to A., and not to C. *Higgins v. Hogan*, vii. U. C. R. 410.

FIELD NOTES.

See EJECTMENT, VIII. 22.

FIERI FACIAS.

See ACTION, 3.—AMENDMENT, I. 1, 4, 7.—EXECUTION, 3, 8, 11, et seq. FALSE RETURN.—IRREGULARITY, 1, 4.—SHERIFF'S SALE, 2, 11, 12.

Al. fi. fa. land.—1. An alias fi. fa. may issue against lands and tenements, returnable at such a distance of time as to allow the sheriff to advertise, &c. *Nickall v. Crawford*, Tay. U. C. R. 376.

Fi. fa. against goods of discharged prisoner.—2. A fi. fa. may issue against the defendant's goods, although he may be discharged from prison for not having been regularly charged in execution. *Dorman v. Rawson*, Tay. U. C. R. 376.

Receipt by plaintiff for debt on misinformation of deputy sheriff.—3. Where, with a view of giving the defendant time, the plaintiff had, upon the misinformation of the deputy sheriff, given a receipt for the debt as the only proper mode of staying the execution, and which receipt the sheriff had stated in the return of the writ of fi. fa.—the Court ordered an alias to issue. *Hennerley v. Gould*, Tay. U. C. R. 182.

Fi. fa. lands tested after death of debtor.—4. A writ of fi. fa. against lands, bearing teste after the death of the defendant, is void. *McCarthy v. Low*, ii. O. S. 353.

Tested in life-time of debtor, but executed after death.—5. But if the writ of fi. fa. be tested in the life-time of the debtor, it may be taken out and executed after his death. *Doe dem. Hagerman v. Strong et al.*, iv. U. C. R. 510.

Fi. fa. lands before fi. fa. goods—Sale.—6. It is irregular to issue a fieri facias against lands, until after the execution against goods has been returned, but as it is only an irregularity, a purchaser at sheriff's sale under the writ against lands cannot be affected by it. *Doe dem. Spafford v. Brown et al.*, iii. O. S. 92.

Against testator's lands, on return of nulla bona against goods.—7. A judgment against an executor to recover de bonis testatoris, will warrant

an execution against the testator's lands, on the return of nulla bona against goods. *Doe dem. Jessup v. Bartlet*, iii. O. S. 206.

Reduction of levy.—8. The Court will not interfere to reduce the sum indorsed to levy on a fi. fa. on a strict legal ground, unless the defendant has an equitable ground to sustain his application. *Maitland et al. v. Secord*, Dra. Rep. 469.

Return.—9. It is not improper for a sheriff to return to a writ of fieri facias that he has made the money and paid it over to the plaintiff's attorney, the words in Italics being mere surplusage. *Doyle v. Bergin*, Trin. Term, 1 & 2 Vic.

When duplicate allowed.—10. An original writ of fieri facias, with the sheriff's return thereon, having been lost, the plaintiff was allowed to issue a duplicate, to obtain a return for warranting an alias. *McEwen v. Stoneburne*, Trin. Term, 7 Wm. IV.

Direction of writ.—11. A writ of fi. fa. directed to no one is void, and cannot be amended. *Wood et al. v. Campbell*, iii. U. C. R. 269.

Priority.—12. A fieri facias, at the suit of an execution creditor, placed in the sheriff's hands before a commission of bankruptcy against the debtor was sealed, but on the same day on which it was completed and delivered to the sheriff, has the priority over the commission. *Beekman v. Jarvis*, iii. U. C. R. 280.

[For the estates, properties and interests which may or may not be sold under a fi. fa., see EXECUTION, 3, 11, et seq., with the note to that title.]



FILING PAPERS.

See APPEARANCE, 2, 10.—BAIL, II. 17.—BANKRUPT ETC., 14.—PRACTICE, I. 6, 7, 8; III. 3, 4.—SIMILTER, 2.

FINAL JUDGMENT.

See JUDGMENT.

FINAL PROCESS.

See CAPIAS AD SATISFACIENDUM.—
ELEGIT.—ESCAPE, 15.—EXECU-
TION, passim.—FIERI FACIAS.—
HABERE FACIAS POSSESSIONEM.—
VENDITIONI EXPONAS.

FIRE.

See CASE (ACTION ON THE), 10.—
INSURANCE, passim.—NAVIGATION,
1, 2.—RECORD (NISI PRIUS), 4.—
SHERIFF, V. 14.

FIRE ARMS (SEIZURE OF).

See INDEMNITY ACT, 2.

FISHERY.

The Crown cannot grant an exclu-
sive right of fishery in navigable waters
in this province. *Moffatt et al. v.*
Roddy, Mich. Term, 2 Vic.

FIXTURES.

See COVENANT, II(2), 5.—TROVER,
I. 7, 13.

Meaning of the term.—1. Where
a declaration in trespass was for “fix-
tures,” wheels, mill-stones and ma-
chinery, general damages having been
assessed on the whole declaration, it
was held, on motion in arrest of judg-
ment, that the word “fixtures” would
not necessarily be taken to mean things
attached to the freehold. *Meyers v.*
Marsh, ii. U. C. R. 185.

[Acc. *Sheen v. Rickie*, v. M. & W. 75.]

What is a fixture—When severed,
becomes a chattel.—2. A building put
up by a vendee of land in possession,
under a contract to purchase, which is
found by a jury to rest upon a founda-
tion in some parts let into the soil, and

connected to the foundation by mortar,
is a fixture, and being a fixture it be-
longs to the owner of the soil, and
when wrongfully severed, it becomes
a chattel; and the defendants, who had
at first removed it from the land into
the highway, and afterwards took it
away, committed a trespass in taking
the plaintiff's (the owner of the soil)
goods. *Gasco v. Marshall et al.*, vii.
U. C. R. 193.

[See TRESPASS, I. 9.]

What is a fixture.—3. An engine
fastened into and bolted upon a wooden
frame, which was not merely laid on
the ground but was let into it, the
earth being displaced to let in the
beams or timbers which supported or
formed part of the platform, is a fixture,
and not a chattel for which trover
might be brought, and it is no less a
fixture because it could be taken down
and removed without defacing or re-
moving any part of the walls of the
building within which the wooden
frame is situate. *Oates v. Cameron*,
vii. U. C. R. 228.

FLOUR.

Liability of seller when flour not
branded—Jurisdiction of magistrates
—Informer.—The seller of flour in
barrels not marked or branded, under
4 & 5 Vic. ch. 89, sec. 23, is not liable
to the penalty imposed by that statute,
which applies only to the manufacturer
or packer; and magistrates have no
summary jurisdiction where the accu-
mulated penalties are more than 10%.
Where the inspector in a corporate
town is the informer, he is not entitled
to half the penalty. *Regina v. Beek-*
man, ii. U. C. R. 57.

FORCIBLE ENTRY AND DE-
TAINER.

Restitution.—1. The Court refus-
ed a writ of restitution after a convic-
tion of forcible entry and detainer,

where the premises were a Crown reserve, the lease of which had expired. *Rex v. Jackson et al.*, Dra. Rep. 53.

Inquisition, under 6 Henry VIII. ch. 9.]—2. An inquisition for a forcible entry, taken before magistrates under 6 Henry VIII. ch. 9, must shew what estate the party expelled had in the premises; and if it do not, the inquisition will be quashed and the Court will award restitution. The inquisition is also bad if it appear to the Court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of forty shillings, or that the party complaining was sworn as a witness. *Rex v. McHeavery et al.*, and *Mitchell v. Thompson*, Mich. Term, 1 Vic.

FOREIGNER.

See **ABSCONDING DEBTOR**, 8.—**ALIEN**. ARREST, I. 19; IV. 2.—**COSTS**, I (2), 6.—**SECURITY FOR COSTS**, 2 et seq.

FOREIGN BILLS.

See **BILLS OF EXCHANGE ETC.**, IV. 23.

FOREIGN CORPORATIONS.

See **CORPORATION**, 3.

FOREIGN COURTS.

Evidence of proceedings.]—The judge's private seal is not evidence of the proceedings of a foreign court of justice. *Brown v. Hudson*, Tay. U. C. R. 369.

[See **FOREIGN JUDGMENT**, 2.]

FOREIGN JUDGMENT.

Plea of.]—1. A plea of a foreign judgment pleaded puis darrein continuance, must shew that the cause

arose since the last continuance, and that the judgment was on the merits and conclusive between the parties in the court or country where it was given, or the plea will be bad; and *Semble*, such a judgment properly pleaded would be a bar. *McPhedran v. Lusher*, iii. O. S. 602.

Action upon—Proof of seal.]—2. In an action upon a foreign judgment, the seal of the foreign court is sufficiently proved by a person who examined the seal on the judgment with the original seal in the proper office of the foreign court. *Hall v. Armour*, Hil. Term, 6 Wm. IV.

Costs, when awarded by the judgment itself.]—3. Costs are recoverable on a foreign judgment which awards costs, although not actually taxed until long after the time when the judgment was entered. *Id.*

Proof.]—4. A foreign judgment cannot be proved by a certificate from the clerk of the foreign court that judgment has been entered for a certain sum in favor of the plaintiff. *Norton v. Post*, Easter Term, 6 Wm. IV.

5. The mere exemplification of a foreign judgment, if properly proved to be under the seal of the Court, is sufficient evidence of the judgment, without any proof that the exemplification was compared with the original papers filed, or the roll. *Warener et al. v. Kingsmill et al.*, vii. U. C. R. 409.

When evidence filed in a foreign court binding here.]—6. In an action on a foreign judgment, reference may be made to the evidence filed of record with the judgment according to the course of the foreign court, on proof by examined copies to shew the grounds of the judgment; but where the cause in the foreign court was undefended, and the plaintiff admitted a set-off there, the defendant here is not bound by such admission. *Brewster v. Thomas*, Easter Term, 3 Vic.

Evidence to shew judgment excessive.]—7. In an action on a foreign

judgment, the defendant cannot go into evidence to shew that on the merits in the foreign court the judgment should have been for a less amount than the sum decreed. *Racy v. Goodman*, Easter Term, 3 Vic.

Presumed valid till contrary proved—Executors.]—8. If a foreign judgment against two defendants be several in its terms, the Court here will hold it good, as according with the law of the foreign country until the contrary be shewn; and the executor of one defendant may be sued, although the other defendant survive. *Ib.*

Judgment must be final in its nature.]—9. An action will not lie upon the decree or judgment of a foreign court which is not final in its nature, but merely to do some act to save a party harmless and indemnified. *Gauthier v. Routh*, Mich. Term, 7 Vic.

Action—Pleas of no jurisdiction, and that judgment was without defendant's knowledge.]—10. In debt on a judgment of the Court of Queen's Bench at Montreal in Lower Canada, the defendant pleaded that the Court had no jurisdiction in the matter in which the judgment was rendered, and also that the defendant was never served with any process whereby he could be, or was notified or apprised that the action was commenced or was pending, and that the judgment was obtained without his knowledge and contrary to reason and justice. The Court held both pleas to be bad on demurrer. *McPherson et al. v. McMillan*, iii. U. C. R. 30.

Assumpsit—General issue—Objections to proceedings prior to judgment.]—11. In assumpsit on a foreign judgment, the judgment cannot be impeached for any alleged defect in the proceedings prior to judgment, under the general issue. *McPherson et al. v. McMillan*, iii. U. C. R. 34.

7 Vic. ch. 16, sec. 54.]—12. The statute 7 Vic. ch. 16, sec. 54, is bind-

ing on the Courts in Upper Canada, as well as upon the Court in Lower Canada. *Ib.*

Action—Averment that cause of action arose within jurisdiction of foreign court.]—13. In an action upon a foreign judgment rendered in an inferior court, it is not necessary to aver that the cause of action arose within the jurisdiction of that Court. *Prentiss v. Beemer*, iii. U. C. R. 270.

Assumpsit against two defendants—Plea that one was never served with process.]—14. The plaintiff declared in assumpsit on a foreign judgment against two defendants. Defendants pleaded that one of them had never been served with process, and had no notice whatever of the proceedings in the foreign court: *Held*, plea bad, as setting up a matter of defence for both of the defendants, which applied only to one of them. *Bacon v. McBean et al.*, iii. U. C. R. 305.

FOREIGN LANGUAGE.

See *BILLS OF EXCHANGE ETC.*, V. 22, 23.

FOREIGN LAW.

See *BILLS OF EXCHANGE ETC.*, III. 13, 14, 19.—*EXECUTOR ETC.*, I. 11.—*FOREIGN JUDGMENT.—LIMITATIONS (STATUTE OF)*, IV. 5.

Printed law in foreign country, how proved.]—1. *Semble*: That it is now settled in England that the printed law of a foreign country may be proved by viva voce of a witness. *Short v. Kingsmill et al.*, vii. U. C. R. 350.

Authorizing discharge of an insolvent debtor—Proof.]—2. A foreign law authorizing the discharge of an insolvent debtor, must be directly proved; and the Court will not listen to an application for the discharge of such person, after he has allowed

judgment to go by default and is in execution. *Brown v. Hudson*, Tay. U. C. R. 476.

Power of attorney from Lower Canada to convey lands here, not under seal.]—3. A power of attorney and contract of sale passed before a notary in Lower Canada, (an instrument not under seal,) is not sufficient to authorize a conveyance of lands in this province. *Doe dem. Sheldon v. Armstrong*, Tay. U. C. R. 484.

Discharge from arrest by foreign authority—Arrest under process of this court.]—4. Where the person of an insolvent is discharged from arrest by foreign authority, the Court will not set aside an arrest made under the process of this Court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries. *Brown v. Hudson*, Tay. U. C. R. 537.

Discharge from arrest by insolvent law of New York.]—5. The Court refused to discharge a defendant upon filing common bail, on the ground of his person having been discharged from custody by an insolvent law of New York. *Dascomb v. Heacocks*, Tay. U. C. R. 606.

FORFEITURE.

See EJECTMENT, I. 2, 8, 9, 10, 11, 12; VIII. 17.—RECOGNIZANCE. REPLEVIN ETC., 14.—TREASON.

For non-payment of rent—Ejectment—Evidence.]—1. In ejectment for a forfeiture for the non-payment of rent, the plaintiff must prove, if proceeding under 4 Geo. II. ch. 28, that there was no sufficient distress upon the premises, and if at common law, that the rent was demanded in proper time by a person duly authorized. *Doe dem. Cubitt et al. v. McLeod*, Mich. Term, 4 Vic.

Tenant holding land adverse to landlord.]—2. A claim by a tenant to hold the land leased, against the landlord, as being of right his own, and

FRAUDS (STATUTE OF).

a refusal to pay rent, is a forfeiture by the tenant of his term, and the landlord can at once maintain ejectment against him during the currency of the lease. *Doe dem. Nugent v. Hessel*, ii. U. C. R. 194.

Acknowledgment by tenant of title in another.]—3. A term is not forfeited by the tenant taking a title from a stranger, but only by his acknowledging by record that the fee is in another than in his landlord. *Doe dem. Daniels v. Weese*, v. U. C. R. 589.

FORWARDER.

See CARRIER, 1, 7, 8, 15.

FRANCHISE.

See FERRY.—FISHERY.

FRAUD.

See ATTORNEY, III. 9.—CASE, (ACTION ON THE), 5.—CONTRACT, 3, 7. DEED, III. 3; IV. 1.—EJECTMENT, VIII. 6.—EVIDENCE, VIII. 7.—EXECUTOR ETC., I. 8; III. 10.—FRAUDULENT DEEDS ETC.—INSURANCE, 3.—LEAVE AND LICENSE, 3.—LIMITATIONS (STATUTE OF), III. 2.—NEW TRIAL, I. 18.—PRACTICE, I. 33.—RELEASE, II.—VERDICT, 1.

FRAUD (PLEA OF).

See ATTORNEY, II(2), 2.—BILLS OF EXCHANGE ETC., VI. 1.—COVENANT, II(2), 10.—DE INJURIA, 1. INDEMNITY BOND, 7.—PLEADING, VI. 6, 7.

FRAUDS (STATUTE OF).

See CONTRACT, 7.—EVIDENCE, I. 6, 7.—GUARANTEE.

- I. SECTION 4. (*Sales of lands*).
- II. SECTION 10. (*Trust estates*).
- III. SECTION 17. (*Sales of chattels*).

I. SECTION 4. (*Sales of lands*).

See ACCOUNT STATED, 6, 9.—BILLS OF EXCHANGE ETC., I. 17.—EXECUTOR ETC., I. 6.—MONEY HAD AND RECEIVED, 7.—PLEADING, I. 7.

Sale of wheat ready for harvest.—

1. *Quære*: Is the sale by a sheriff of a crop of wheat ready for the harvest the sale of a mere chattel, not requiring a writing under the 4th section of the Statute of Frauds? *Haydon v. Crawford*, iii. O. S. 583.

[An agreement for the sale of growing fruit, is an agreement for the sale of an interest in land.—*Rodwell v. Phillips*, ix. M. & W. 501; so is the sale of growing timber.—*Ellis v. Grubb*, iii. O. S. 611.]

Agreement to clear land, taking the wood in payment therefor.—2. An agreement to enter upon and clear land, and take the wood after it is cut down in payment of the labor, is not for an interest in the lands within the Statute of Frauds. *Hamilton v. McDonell*, Easter Term, 2 Vic.

Sufficiency of agreement.—3. Several documents may be construed together as evidence of an agreement or note in writing, under the Statute of Frauds—a conveyance in fee from the plaintiff to the defendant, with absolute covenants for title, but not for further assurance, at a fixed period, on receiving an additional sum of money with interest, together with a subsequent written offer from the defendant to the plaintiff to purchase another property, on paying part of the purchase money at once and the residue at a future day, on receiving a bond from the plaintiff, like the former bond for a deed of confirmation, in the same manner as in that deed: *Held*, sufficient to constitute an agreement or note, or memorandum thereof of the second purchase within the statute, and to enable the plaintiff to recover from the defendant the sum specified in the bond and interest thereon, on his tendering a confirmation and making a demand of the money. *Rochleau v. Bidwell*, Dra. Rep. 357.

4. Evidence of a bond signed by A. and delivered to B., who received the consideration, is sufficient to take a case out of the Statute of Frauds, although nothing was signed by B., and the action was brought against him on an agreement relating to lands. *Kilborn v. Forester*, Dra. Rep. 344.

Offer in writing—Acceptance also in writing.—5. An offer in writing to purchase lands, stating terms, and an acceptance of that offer also in writing, is a sufficient contract in writing respecting an interest in lands under the statute. *Kerby v. Lawrence*, i. U. C. R. 184.

Verbal agreement for a lease—Breach.—6. Where the defendant had agreed verbally to let the plaintiff a certain shop and premises for a year, to commence at a future day, and on the day the defendant put the plaintiff into part of the demised premises, but could not give him the possession of the residue, in consequence of which the plaintiff suffered loss, and brought an action against the defendant on the agreement: *Held*, that he was entitled to recover, as the defendant could not successfully object that the agreement was void under the Statute of Frauds. *Clark v. Serricks*, ii. U. C. R. 535.

II. SECTION 10. (*Trust estates*).

See EXECUTION, 17, 21.

III. SECTION 17. (*Sales of chattels*).

See AUCTION, 1, 3, 8, 9.—PLEADING, I. 8.

Sale of wheat ready for harvest—Delivery—Payment.—1. *Quære*: If the sale by a sheriff of a crop of wheat ready for harvest be not the sale of an interest in lands—still, to satisfy the statute and make the sale legal, should there not be proof of the delivery of the wheat, or payment of the price? *Haydon v. Crawford*, iii. O. S. 583.

Sale of plate, value 70l.—Acceptance and delivery.—2. Where A. purchased plate of B. of the value of 70l. and desired him to have his crest engraved on it, and afterwards to forward it to his place of residence, but paid no part of the purchase money nor any earnest, and B. having obeyed his orders, brought an action against him for the price, A. having refused to receive the plate, saying that it was not the same as he had purchased: *Held*, that A.'s directions as to the engraving of the crest and forwarding to his place of residence, constituted a sufficient acceptance and delivery to take the case out of the 17th section of the Statute of Frauds. *Walker v. Boulton*, iii. O. S. 252.

Agreement for sale of goods—Delivery of part—Refusal to receive residue—Action for price.—3. Where in an action for goods sold and delivered the plaintiff shewed a contract between the defendant and himself for the sale purchase of 21 sticks of timber at 2l. 10s. per thousand feet, and it was proved that the timber had been delivered at the place appointed by the defendant, where the agents of the plaintiff and defendant had measured eight of the sticks, the value of which was paid into court, and the defendant repudiated the rest: *Held*, that there was no acceptance of the residue, by which the plaintiff could recover as for goods sold, nor was there any binding agreement within the statute. *Grover v. Cameron*, Mich. Term, 5 Vic.

FRAUDULENT ASSIGNMENT.

See FRAUDULENT DEEDS AND ASSIGNMENTS, *passim*.

FRAUDULENT DEEDS AND ASSIGNMENTS.

See BANKRUPT ETC., 11, 17.—DEED, IV. 1.—EJECTMENT, VIII. 15.—NEW TRIAL, I. 9, 16; VI. 5.

Who entitled to impeach.—1. A deed fraudulent as to creditors, cannot be impeached by the heir of the party who committed the fraud, or by a stranger acting nominally for himself but really for the heir. *Doe dem. Daily v. Vankoughnet*, Trin Term, 6 & 7 Wm. IV.

[See further, the note to case 11, *infra*.]

Assignment, within statute 5 Wm. IV. ch. 3.—2. The assignment of a lease by the lessee to a trustee, for a bona fide creditor of the assignor, with the intention of thereby evading the creditors of the cestui que trust, is not a fraudulent assignment within the provincial statute 5 Wm. IV. ch. 3, sec. 8. *Doe dem. Biggard v. Millard*, Easter Term, 3 Vic.

Assignment made immediately before executions without change of possession.—3. Where a merchant, just before several executions were issued against his property, assigned it to trustees for the benefit of his creditors, with the most minute accuracy in the description of every article, delivering to the agent of the trustees one article in the name of all, and then took down his name from over his shop door, but remained with his clerks in the possession of the goods, selling them as if they were his own, but accounting to the trustees for the proceeds, and the property was taken under executions by the sheriff as if it were still his: *Held*, on trespass brought by the trustees against the sheriff for the seizure, the jury having negatived their possession, that a verdict for the defendant was correct. *Armstrong et al. v. Moodie*, Trin. Term, 7 Vic.

Made after fi. fa. returned.—4. An assignment of goods made by a debtor, after a writ of fi. fa. goods has been returned "nulla bona," and after the return day is past, is valid. *Pollock et al. v. Fraser*, iv. U.C.R. 523.

Goods returned to debtor by sheriff's vendee—Subsequent seizure.—5. Where a debtor in embarrassed cir-

circumstances executed a cognovit in favor of one of his creditors, without that creditor's knowledge, and the debtor's household furniture was sold upon an execution, and the creditor became the purchaser, and immediately leased the furniture to the debtor, at a rental amounting only to the interest of the money for which the furniture had been purchased, giving the debtor power to retain it as long as he pleased, and not making any provisions for deterioration in it; and the same furniture was afterwards seized in execution at the suit of another creditor; and on the claim of the first creditor, an issue was directed under the Interpleader Act, which was found in favor of the second execution creditor, on the ground that the sale in execution to the first creditor had been collusive—the Court refused to grant a new trial on affidavit. *Servos v. Tobin et al.*, ii. U.C.R. 530.

[See NEW TRIAL, VI. 5.]

How far valid, when intended to defeat an expected execution.—6. *Semble*: That since the decision of *Wood v. Dixie*, (7 Q. B. 829), a bona fide transfer of property made by a debtor to a third party cannot be considered invalid, merely because the object of the sale, in the mind of both parties, was to defeat an expected execution. The rule in this case, however, was discharged on other grounds; and see the strong language of *Robinson, C. J.*, expressing a hope that whenever it became necessary to decide here the point taken in *Wood v. Dixie*, the Court might not feel itself constrained to adopt such a view of the law, *White v. Stephens*, vii. U. C. R. 340.

Certain badges not conclusive of fraud.—7. The fact that a bill of sale, while importing on the face of it to be an absolute bill of sale, is in truth only a mortgage, and the further fact that the vendor, after the sale, is allowed to remain in possession of the goods, are both badges of fraud, to be weighed

by a jury—not proofs of fraud so conclusive as to leave the jury no alternative but to find fraud, whether they believe it or not. *Hunter v. Corbett*, vii. U. C. R. 75.

8. It is not always to be taken as conclusive evidence that a deed is fraudulent against creditors, that the debtor has remained in possession, receiving the rents and profits for a long time after the execution of the deed. *Doe dem. Roy v. Hamilton*, Trin. Term, 5 & 6 Vic.

9. When property is conveyed in trust to pay debts it cannot be considered as a fraudulent conveyance against creditors not included with the creditors for whom the trust is declared. *Doe dem. Laurason v. The Canada Company*, Trin. Term, 5 & 6 Vic.

Execution upon confession cutting out assignment.—10. Under what circumstances an assignment made by a debtor of his goods to one or more of his creditors for the benefit of themselves and others, may be upheld against another creditor, who has seized the same goods in execution upon a judgment confessed to him before the assignment. See *Farish v. McKay*, v. U. C. R. 461.

New trial, where a party succeeds on a fraudulent deed.—11. Where in ejectment against a purchaser, under a deed made by a sheriff of lands sold in execution, there was good reason to believe that the deed of the lessor of the plaintiff was fraudulent as against creditors although the jury found otherwise, a new trial was granted. *Doe dem. McRae v. Proudfoot*, Mich. Term, 6 Vic.

[A deed fraudulent against creditors is also fraudulent and void against the assignees of the party conveying on his insolvency, as the assignees represent the creditors. *Doe dem. Grimsby v. Ball*, xi. M. & W. 531.—A judgment likewise fraudulent against creditors is fraudulent against the sheriff who represents a creditor upon a subsequent judgment. *In-ray v. Magnay*, xi. M. & W. 267.]

Voluntary deed void against subsequent deed by sheriff.—12. A debtor

after judgment and execution against his goods, having conveyed certain lands without consideration, which he held as the legal owner under a deed containing no declaration of trust, and the same lands having been sold under an execution subsequently issued against his lands, the Court held that the deed, being a voluntary conveyance, was fraudulent and void against the sheriff's vendee. *Doe dem. Steel v. McGill*, Mich. Term, 6 Vic.

13. A deed purporting to be a deed of bargain and sale, but containing no statement of consideration, pecuniary or otherwise, and no sufficient proof of consideration given aliunde, held void in law against a bona fide purchaser for value at sheriff's sale, under judgment and execution, although the jury had negatived any fraud in fact. *Doe dem. Proudfoot v. McCrae*, Easter Term, 7 Vic.

Void against subsequent purchaser for value.—14. A deed made by one brother to another in consideration of natural love and affection, is void against a subsequent purchaser from the grantor for a valuable consideration. *Doe dem. Phillpott v. Blanchfield*, i. U. C. R. 350.

Over-due mortgages of personal property void as against creditors.—

15. The mortgagee of personal property who suffers the mortgagor to remain in possession and make use of the property as his own long after the time limited for the payment of the mortgage money has expired, loses all right to the property as against the creditors of the mortgagor. *Steel v. Hamilton*, Trin. Term, 1 & 2 Vic.

[Mortgages of personal property must be filed in the county court and renewed yearly. See statute 12 Vic. ch. 74, amended by 13 & 14 Vic. ch. 62.]

Assignment of property subsequent to several executions, and prior to others.—16. Where a debtor assigned to a creditor property which was seized by the sheriff on several writs of execution, which came into his hands on

the day on which the assignment was made, and those writs were subsequently satisfied by the sale of other property of the debtor, but before they were satisfied, and a fortnight after the assignment, an attachment against the debtor's property came also into the hands of the sheriff: *Held*, that the property assigned was secured to the assignee against the attachment, although it had been liable to the preceding executions. *Hooker et al. v. Jarvis*, Trin. Term, 5 & 6 Vic.

FREDERICKSBURGH.

Where it was shewn that a survey made in the township of Fredericksburgh under 7 Geo. IV. ch. 16, was not made as nearly as could be ascertained in accordance with the original survey, according to the provisions of that act, it was held that such survey was invalid. *Doe dem. Clapp v. Huffman*, Mich. Term, 5 Vic.

FREEDOM FROM INCUMBRANCES (COVENANT FOR).

See COVENANT, II(2), 1, 2, 5, 8.

FREIGHT.

See CARRIER, *passim*.—DEMURRAGE, 2.

FURTHER ASSURANCE (COVENANT FOR).

See COVENANT, I. 1, 2, 4; II(2), 9.

GAMING.

See BILLIARD TABLES.—BILLS OF EXCHANGE ETC., VI. 1.

Illegal wagers—13 Geo. II. ch. 19.]
—1. A. betted B. 75*l.* to 50*l.* upon a horse race, and deposited the money in the hand of C., a stake-holder. They

did not own either of the horses which were to run, nor was there any other match or stake for which the horses were to run. A. lost, and disputing it, gave C. notice not to pay over the money to B., but C. did so: *Held*, that A. could recover back his deposit from C. in an action for money had and received, upon the ground that the wager was illegal, being contrary to the statute 13 Geo. II. ch. 19. *Sheldon v. Law*, iii. O. S. 85.

[Money lent for the purpose of gaming cannot be recovered back.—*McKinnell v. Robinson*, iii. M. & W. 434.]

Money had and received against treasurer of races for the purse.—2. Where, according to the rule of a race for a purse of 100 guineas, the decision of the stewards appointed to superintend the race was to be final on all questions respecting the winning or losing of the race, and the plaintiff's horse was the winner of the first heat and came in first in the second, but in consequence of alleged foul riding, was adjudged by the stewards to have been distanced, and another horse was declared the winner: *Held*, that the plaintiff could not maintain an action for money had and received against the treasurer of the race who had not paid over the purse, on the ground that a majority of the stewards had not concurred in the decision against his horse, and on proof that there had in fact been no foul riding, he having assented to the decision of the said stewards on the first heat, and their decision according to the rule being in all cases final. *Gorham v. Boulton*, Easter Term, 5 Vic.

Liability of proprietor of race course for purse.—3. The proprietor of a race course is not responsible for the purse run for, unless upon clear proof of an express undertaking to that effect. *Gates v. Tinning*, iii. U. C. R. 295.

4. If the express undertaking can be proved, he would be responsible for

the purse. *Gates v. Tinning*, v. U. C. R. 540.

Right of winner to his entrance money on not being paid the purse.]

—5. A winner at a horse race has no right to recover back his entrance money because the purse has not been paid over to him. *Gates v. Tinning*, iii. U. C. R. 295.

Declaration under 10 & 11 Wm. III.—6. A declaration under 10 & 11 Wm. III. for playing at a lottery is insufficient if it state the charge for playing at a game "called" a lottery, without further specification. *Clarke v. Donnelly*, Trin. Term, 5 & 6 Vic.

Lotteries of horses &c.—12 Geo. II. ch. 28.]—7. The provisions of 12 Geo. II. ch. 28, supersede the provisions of 10 & 11 Wm. III. with respect to lotteries of horses, carriages and other personal chattels. *Ib.*

GAOL.

See DISTRICT COUNCIL, 3.—ESCAPE, 24.—QUARTER SESSIONS, 3.

GAOLER.

See ESCAPE, 1.

Costs to gaoler for bringing up prisoner under habeas corpus.—1. The court determined it not unreasonable for a gaoler to charge 6d. per mile, both going and returning with a prisoner by habeas corpus. *Robinson v. Hall*, Tay. U. C. R. 664.

Liability, when proceedings of justices irregular or altogether void.—

2. Where the justices have a general jurisdiction over the subject matter upon which they have issued a warrant of commitment to the gaoler, though their proceedings be erroneous, the gaoler is not liable to an action. *Secus*: If the proceedings be wholly void. *Fergusson v. Adams*, v. U. C. R. 194.

3. *Quære*: Where a magistrate has, under the Summary Punishment Act, committed a party unconditionally when his commitment should have been conditional, upon his not paying a fine, can it be said that he has so far acted within his jurisdiction as to make his warrant a justification to the gaoler, who obeyed it? *Ib.*

Delivery of warrant—When original to be shewn.—4. *Semble*: That under the 6th section of the act 24 Geo. II. ch. 44, a copy of the warrant, if delivered by the gaoler without shewing the original, and no objection made, will be sufficient. *Semble, also*: That if the original be demanded, its production will be good, though shewn after six days. *Ib.*

GAOL LIMITS.

See LIMITS.

GAS COMPANIES.

See PLEADING, II. 36.

Liability for nuisance—Due care.]

—1. *Quære*: Can the Gas Company of the City of Toronto, under their act of incorporation and their lease from the City of Toronto, carry on their work of manufacturing gas, &c., without liability for nuisances injurious to private rights, so long as they occasion no nuisance which they could, by due care, have avoided? *Watson v. Gas Company*, v. U. C. R. 262.

Liability of stockholders, under 11 Vic. ch. 14, to pay calls made by the secretary of the company in pursuance merely of a resolution adopted by the directors before the passing of the act.]

—2. The gas company of Toronto sued stockholders A., B., C. and D., in separate actions of debt, founded upon the statute 11 Vic. ch. 14. This statute relates only to such actions as might be brought for the recovery of money, which "should from time to time be

called for by the directors of the said company, that is, of the company incorporated by the statute, *under and by virtue of the power and directions of that act.*" It was proved in evidence at the trial that the secretary of the company, acting under a *resolution* merely of the directors, passed before the statute 11 Vic. ch. 14 came into force, notified the stockholders that a call of ten per cent. would be made on the first of May, June, July and August: *Held*, that, as upon this evidence, these calls could not be said to be "made by the directors of the company, acting *under and by virtue of the power and direction of that act*," the company could not sustain their action upon the statute. *Semble*: That it is not a resolution of the directors to make a *call* upon the stockholders, which constituted the *call*, but the notice of advertisement of the call itself. *Semble*: That where an act says "that no instalment shall be called for, except *after* the lapse of one calendar month from the time when the last instalment was called for:" calls made for first of May, June, July and August, would be illegally made. *Quære also*: Whether the four calls could regularly be made at one time? *Gas Company v. Russell et al.*, vi. U. C. R. 567.

Assumpsit, as well as debt, maintainable.]

—3. Under the statute 11 Vic. ch. 14, the Consumers' Gas Company of Toronto may sue in assumpsit for calls; the remedy is not confined to debt. *Consumers' Gas Company v. Nicolls*, vii. U. C. R. 91.

Averment of consideration and time.]

—4. In so declaring *under the act*, an averment of consideration to support the promise is not necessary; neither is it necessary to lay the promise to pay on a certain day; the general terms, that the defendant *afterwards* promised to pay, is sufficient. *Ib.*

Liability in assumpsit on a parol agreement.]

—5. *Held*: That an action

of assumpsit would well lie against the Gas Light and Water Company of the City of Toronto, for non-fulfilment of a parol agreement for the supply of water to the Toronto Baths. (Robinson, C. J., dissentiente). *Blue v. Gas and Water Company*, vi. U. C. R. 174.

GENERAL AVERAGE.

See CARRIER, 9, 10, 11.

Stranding of vessel—Owners of cargo liable for expenses.—1. Where a vessel was shewn to have been dangerously stranded on our lakes by accident, arising from the perils of navigation, and without fault of the master: *Held*, that the expense incurred by the master in hiring a steamer to haul her off, and by which he was enabled to proceed to his destination, gave a claim for contribution against the owners of the cargo, upon general average. *Grover v. Bulluck*, v. U. C. R. 297.

Stranding must be voluntary.—2. The owners of a vessel have no right to set up a claim to average on account of expenses occasioned by stranding, when the stranding was not voluntary; and it has been held, "that the mere steering a vessel to a less dangerous place for stranding," when she is inevitably driving to the shore, is not a voluntary stranding. *Gibb v. McDonell*, vii. U. C. R. 356.

Who liable to contribution for loss of goods.—3. The owners of goods, stored under the deck of a vessel, are not liable to contribute by way of general average, to the loss of goods laden on deck and thrown overboard from necessity in a storm, and with the hope of saving the ship and cargo. *Semble*: That the ship-owner would, in such a case, be liable to general average. *Id.*

Deck cargo—Average by master to owner of the goods.—4. Where the usage is proved to carry a deck cargo,

if that cargo be thrown overboard in a storm to lighten the vessel the owner of the vessel is liable for average to the owner of the deck cargo, without proving the value of the cargo in the hold, and without taking that value into account. *Grousette v. Ferrie*, Mich. Term, 6 Vic.

GENERAL ISSUE.

See ASSAULT AND BATTERY, 5.—BAILIFF, 2.—CASE (ACTION ON THE), 4.—CONSTABLE, 1.—DIVISION COURT, 2, 3.—EASEMENT, 6. EXECUTOR ETC., II. 8.—FALSE IMPRISONMENT, 8.—FOREIGN JUDGMENT, 11.—INFORMATION, 7.—LIBEL AND SLANDER, II. 6; III(2), 1, 5, 3, 4.—MALICIOUS ARREST, 12. NEW TRIAL, II. 8; X. 19.—PLEADING, I. passim; II. 25; VI. 1.—PRACTICE, I. 25.—TROVER, II. 3. WARRANTY.

Admissibility of evidence which should be specially pleaded.—1. Where a defence should be specially pleaded, the court in banc. will not, without the consent of the parties, admit evidence of such defence under the general issue. *Longworth v. McKay et al.*, Trin. Term, 4 & 5 Vic.

Trespass quare clausum fregit—General issue—Evidence.—2. Where in trespass quare clausum fregit et de bonis asportatis, by one of two tenants in common, it was proved that the defendant entered upon the land under a writ of execution against the goods of the other tenant: *Held*, that such entry could not be given in evidence under the general issue, but should be specially pleaded. *Newkirk v. Payne*, Mich. Term, 6 Vic.

Trespass for killing plaintiff's horse—Special defence.—3. In trespass for driving against the plaintiff's horse and killing him, the defendant cannot, under the general issue, give in evidence that the accident happened

from the plaintiff's negligence, or without any fault on the part of the defendant, but such defence must be pleaded. *Macdonald v. Monk*, iii. O. S. 20.

Trespass against a magistrate—General issue—Evidence.—4. Where a magistrate is sued in trespass for an alleged illegal proceeding, under the 4 & 5 Vic. ch. 26, he may give in evidence a tender of amends, under the plea of the general issue. *Moore v. Holditch et al.*, vii. U. C. R. 207.

"According to the statute," instead of "by statute."—5. Where to an action of trespass the defendant pleaded "not guilty," and inserted in the margin "according to the statute," instead of "by statute:" *Held*, marginal reference sufficient. *Robertson v. Cooley et al.*, vii. U. C. R. 305.

GOOD FRIDAY.

See PRACTICE, III. 7.

GOODS SOLD.

See ACTION, 4.—ARREST, I. 11, 12, 15, 25, 34.—ASSUMPSIT, I. 1.—AUCTION ETC., 6.—BILLS OF EXCHANGE ETC., VII. 10.—CASE (ACTION ON THE), 2.—CONTRACT, 14.—FRAUDS (STATUTE OF), III. 3.—SET-OFF, 10.—WITNESS, 6.

Sale of goods—Non-acceptance—Goods sold not maintainable.—1. Where the defendant in this country ordered certain articles of clothing to be made and sent to him by the plaintiff from England, and on their arrival here they were received by the plaintiff's agent, who did not tender them to, nor leave them with the defendant, although he demanded payment for them, which was refused: *Held*, that an action for goods sold and delivered would not lie, but that the plaintiff

should have declared specially for the non-acceptance. *Lane v. Melville*, iii. O. S. 124.

Goods furnished to a steamboat when in tortious possession of captain—Action.—2. Where a steamboat was mortgaged and in the possession of the mortgagees, who navigated her for their own benefit to secure their advances, and she was tortiously taken possession of by the captain, who received the profits arising from her, for his own use: *Held*, that the mortgagor was not liable for goods furnished for the vessel while she was in the tortious possession of the captain. *Fraser v. Flint*, iv. O. S. 12.

Action for goods sold and delivered to a third party.—3. An action for goods bargained and sold cannot be maintained against a person who has become responsible for the payment of goods delivered to a third party. *McKenzie et al. v. McBean*, iv. O. S. 137.

Action barred by an evasion of the revenue laws.—4. Where merchants residing in the United States sold goods to the defendant and combined with him in furnishing false invoices to evade the revenue laws of this province in respect of the amount of duties to be paid on the importation of those goods: *Held*, that the plaintiffs could not recover their value from the defendant in this country. *Mullen et al. v. Kerr*, Mich. Term, 5 Vic.

[This case was afterwards upheld in *Driggs v. Waite*, Hil. Term, 6 Vic.]

Verbal agreement to purchase land—Payment in cattle and money—Land sold to another person.—5. Where the plaintiff had agreed verbally with the defendant to purchase a piece of land from him, and having been let into possession by him, had made payments on account of the purchase money, in money and cattle, and the defendant afterwards sold the land to another person, promising to repay to the plaintiff what he had received from

him: *Held*, that on his refusing afterwards to do so, the plaintiff could recover the amount from him in an action for goods sold and delivered, and for money paid. *Hill v. Stanton*, ii. U. C. R. 149.

Certain price must be proved.]—6. To support the common count for goods bargained and sold, the plaintiff must prove a certain price agreed upon; when this cannot be done, the declaration should contain a special count for not accepting. *Elvidge v. Richardson*, iii. U. C. R. 149.

Agreement for sale of goods—Part sold—Part mislaid and not returned as agreed.]—7. Received of ——— six boxes of axes, to be sold for him on commission, and when sold, I agree to account to him for those sold at the rate of &c., and to return the remainder unsold on demand: *Held*, that an action for goods sold and delivered, would not lie for any of the axes not returned. *Dodds v. Durand*, v. U. C. R. 623.

8. Good to ——— for the above goods, either to be returned or paid for: *Held*, that after demand of the goods, they might be sued for as goods sold and delivered. *Harvie v. Clarkson*, vi. U. C. R. 27.

Agreement, whether a past or future consideration.]—9. *Held*, upon the following agreement, "On or before the 10th of May 1846, I promise to pay to D. Thompson or bearer, pine saw-logs &c. for value received, &c. H. Hiffernan," that the logs must be considered as paid for, and that Hiffernan could not recover from Thompson the value of the logs in an action of debt upon the common counts for goods sold and delivered. *Hiffernan v. Thompson*, vi. U. C. R. 207.

GRANT.

See CROWN GRANT.

GRANTEE OF THE CROWN.

See CROWN GRANT, *passim*.—EJECTMENT, I. 6, 26.—ESTOPPEL, 1, 2, 3.—INTRUSION.

GROWING TIMBER.

See ARREST OF JUDGMENT, 11.—DEED, III. 5, 6.—TRESPASS, I. 14, 17.

GUARANTEE.

See BILLS OF EXCHANGE ETC., II. 10; III. 4.—CONTRACT, 10.—GOODS SOLD, 3.—MONEY HAD AND RECEIVED, 11.—PRINCIPAL AND SURETY.

Averment of consideration—Proof.]

—1. Declaration in assumpsit on a guarantee to the following effect:—"Please credit A. one hundred pounds, and I agree to hold myself responsible for the payment of the same," and an averment that the plaintiff did credit A.: *Held*, that the plaintiff must prove such averment; and that calling a clerk, who stated that such credit had been given, because he saw it entered in the plaintiff's books, which were not produced, and which entry had not been made by him, was not sufficient to prove it. *Parker v. Dutcher*, ii. O. S. 106.

2. *Quære*: Is not the above undertaking within the Statute of Frauds? *Ib*.

Past consideration insufficient.]

3. A past consideration, stated in a written undertaking to be responsible for the debt of another, is not sufficient within the Statute of Frauds. *Wilson v. Hill*, Easter Term, 2 Vic.

Statement of consideration.]

4. A guarantee indorsed on a promissory note at the time of its execution in the following words: "We guarantee the payment of the within note," does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds. *Lock et al. v. Reid et al.*, Hil. Term, 5 Vic.

Continuing guarantee—Extension of time—Pleadings.—5. The plaintiff sued the defendant on the following guarantee:—

“*Port Hope, Nov. 14, 1845.*

“I hereby hold myself accountable to you for any goods Mr. Francis Murphy may purchase of you, to the amount of 250*l.*, currency.

(Signed), J. K. Burton.”

It was proved at the trial that the plaintiffs had sold goods to Murphy on the 19th of November 1845, amounting in all to 311*l.*, and that after the original credit of six months on the 311*l.* (understood between the parties at the time of sale, as the jury found) had expired, the plaintiffs had extended the time by taking notes without the privity of the defendant. It was also proved that on the 2nd of April 1846, other goods were sold to Murphy, to the amount of 83*l.*, for which Murphy at the time gave his bill at three months. The defendant pleaded a defence which covered only the first sale of 311*l.*, to which the plaintiffs, by their replication simply denying the truth of his defence, admitted his claim to be limited: *Held*, 1st, That the guarantee was a continuing guarantee. 2ndly, That as the plaintiffs had extended the time of credit as to the 311*l.*, that they had thereby discharged the defendant from any liability on that sum. 3dly, That though the sum of 83*l.* might have been recovered under the continuing guarantee, yet that, from the state of the pleadings, without a new assignment, the plaintiff could not recover in this action. *Ross et al. v. Burton*, iv. U. C. R. 357,

Special guarantee set out—General guarantee proved—Nonsuit.—6. Where the plaintiff charged the defendant as upon a guarantee to pay a certain judgment, which he set out in specific terms, and he afterwards proved at the trial, not this special guarantee, but a guarantee extending to all claims: *Held*, nonsuit right. *Suther-*

land et al. v. McCaskill, v. U. C. R. 316.

7. *Semble*: However, that if the plaintiff had set out the guarantee as it really was, and had then averred the claim under the judgment, he would have shewn a claim applicable to the guarantee and sustained his action. *Ib.*

Continuing guarantee—Guarantee not extended to purchase of goods by partners, if given to one of the partners while alone.—8. *Held*, upon the following guarantee:

“Messrs. A. & D. Shaw.

“Gentlemen: I have just received a line from Mr. Lyman A. Ferris, informing me that he wishes to purchase goods from you. Being acquainted with his circumstances, and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for 150*l.* or 200*l.* worth of goods should he require that amount,” that it was not a continuing guarantee, and was not applicable to the purchase of goods by Ferris and a partner, but to the purchase of goods by Ferris alone. *Shaw et al. v. Vandusen*, v. U. C. R. 353.

Transfer of debts—Statute of Frauds, 4th section.—9. A. being indebted to B., and C. to A., a promise by C. that he will pay B. the debt due to him by A. in consideration that B. will discharge A., does not shew a promise to pay the debt of another, requiring a note in writing, within the statute. *Kissock v. Woodward*, i. U. C. R. 344.

GUARDIAN.

See EJECTMENT, II. 9.—INFANT, 4.

Possession of mother, the possession of a guardian.—The possession of a mother will not be considered tortious as against the heir, being her own child, but will rather be treated as

the possession of a guardian. *Doe dem. Moak v. Empey*, Easter Term, 4 Wm. IV.

HABEAS CORPUS.

See ARBITRATION AND AWARD, I. 3. ESCAPE, 4.—GAOLER, 1.—HUSBAND AND WIFE, 5.

HABERE CORPORA JURATORUM.

See JURY PROCESS.

HABERE FACIAS POSSESSIONEM.

See MESNE PROFITS, 5.

New writ after dispossession.]—1. Where after the execution of a writ of habere facias possessionem, the tenant who had been in possession moved to set aside the proceedings for irregularity, and his rule having been discharged, immediately forcibly dispossessed the lessor of the plaintiff—the Court granted a new writ of habere, the first not having been returned by the sheriff, and ordered that the defendant should pay the costs of the application within a month. *Doe dem. Peck v. Roe*, ii. U. C. R. 27.

Alias writ, when possession quietly relinquished.]—2. Where the sheriff puts a plaintiff in possession under a writ of hab. fac. pos., and the plaintiff afterwards quietly relinquishes that possession in consequence of hearing that an injunction had issued from the Court of Chancery: *Held*, that upon the injunction being dissolved, they could not grant the plaintiff an alias writ of possession. *Doe dem. Deane v. Henderson*, v. U. C. R. 208.

HANDWRITING.

See EVIDENCE, V. 2, 3, 5, 6, 7; VIII. 1.

HARBOR COMPANIES.

See COBOURG HARBOR COMPANY.—CORPORATION, 6.—NIAGARA HARBOR AND DOCK COMPANY.—PORT BURWELL HARBOR COMPANY.—PORT CREDIT HARBOR COMPANY.

HAWKERS' AND PEDLARS' ACT.

See FALSE IMPRISONMENT, 6.

HEARSAY.

See EVIDENCE, III.

HEIR.

See COVENANT, II(1), 4.—DEED, II. 11; III. 1.—EJECTMENT, I. 5, 13, 19; VI. 5; VIII. 11, 13.—ESTATE, 9, 12, et seq.—FRAUDULENT DEEDS ETC., 1.—GUARDIAN.—MAINTENANCE (STATUTE OF), 6, 9, 15, 16. ONUS PROBANDI, 5.—SCIRE FACIAS, 1.

Liability for ancestor's debts.]—1. An action does not lie against an heir on the simple contract debt of his ancestor. *Forsyth et al. v. Hall*, Dra. Rep. 304.

[See also case 5, infra.]

Ejectment—Evidence of pedigree.]—2. In ejectment, between a person claiming as heir and a stranger, slight evidence of pedigree is allowed to go to the jury. *Doe dem. Magher v. Chisholm*, Dra. Rep. 227.

Proof by heir-at-law in ejectment.]—3. In ejectment, if the lessor of the plaintiff claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father. *Doe dem. Humberstone v. Thomas*, iii. O. S. 33.

[Proof of marriage—See MARRIAGE.]

Entitled to surplus money from sheriff after sale of ancestor's land.]—4. The heir-at-law is entitled to re-

cover from a sheriff the surplus of monies arising from a sale of his ancestor's land, on a fieri facias against those lands in the hands of the executor. *Ruggles v. Beikie*, iii. O. S. 347.

Liability on ancestor's undertakings.]—5. In this province (though not in England,) the heir is only liable for the debts of his ancestor on descent of lands. He is not liable for unliquidated damages—as for instance, upon his ancestor's covenant for good title. *Vankoughnett v. Ross*, vii. U. C. R. 248.

[For his right to sue on a covenant entered into with the ancestor—See COVENANT, II (1), 4.]

Possession of heir of tenant at will against owner of the estate.]—6. If on the death of a tenant at will his heir enter, such entry is tortious; and if the heir die, and his heir enter, the original owner or his heir will be put to his action. *Doe dem. Moak v. Empey*, iii. O. S. 488.

HIGHWAY.

See CASE (ACTION ON THE), 4.—EVIDENCE, I. 1; II. 12.—QUARTER SESSIONS, 1.—TOLLS.—TRESPASS, I. 11; II. 3.

Indictment for obstruction.]—1. Where in the original plan of a township a piece of ground was laid out as a highway, which was subsequently granted by the Crown to several individuals, and was occupied by them and others claiming from them for upwards of thirty years, and never had been used as a highway: *Held*, that an indictment for a nuisance for stopping up that piece of ground, claiming it as a highway, could not be sustained. *Rex v. Allan et al.*, ii. O. S. 90.

2. An indictment for obstructing a highway laid out under 50 Geo. III. ch. 1, cannot be supported when the highway has not been established in the manner marked out by the statute, when the report to the magistrates in

Quarter Sessions by the surveyor of roads does not express the exact width of the road nor the precise line in which it is to run. And *semble*, in such a case, all the steps necessary to be taken before a highway can be legally established under the act, should be proved by the prosecutor to have taken place before the defendant can be found guilty. *Rex v. Sanderson*, iii. O. S. 103.

Allowance for, afterwards granted.]—3. Where in an original survey an allowance for road had been made between certain lots, and afterwards, and before 1810, grants were issued from the Crown, making the allowance between other lots: *Held*, that the grants must be considered most correct, and that the plaintiffs, to whom one of the former lots belonged, was entitled to recover for a trespass committed on that part of his lot claimed as an allowance for road. *Field v. Kemp*, iii. O. S. 374.

Original public roads continue so, although new roads deviate.]—4. The original public allowance for road made in the first survey of a township continue to be public highways, notwithstanding a new road deviating from any such allowance may have been opened under the provisions of the statute 50 Geo. III. ch. 1, or may have been confirmed as a highway by reason of statute labor, or public money having been applied upon it. *Spalding v. Rogers et al.*, i. U. C. R. 269.

What constitutes a dedication to the public.]—5. A dedication of land to the public takes effect from the intention of the person making it, and the merely opening or widening a street for the convenience or benefit of the person doing it and permitting the public to use it, will not constitute a dedication. The question of dedication, or no dedication, must now be left as a question of fact for the jury. *Belford v. Haynes*, vii. U. C. R. 464.

After dedication subsequent conveyance void.—6. Where A. has expressly dedicated by deed certain lands for the purposes of a public road, and the public have adopted such dedication by user, A.'s subsequent conveyance of the land to B. cannot control the prior dedication. *Malloch v. Anderson*, iv. U. C. R. 481.

Dedication by tenant with landlord's acquiescence.—7. A tenant for years cannot, by acquiescence or otherwise, dedicate a portion of the leasehold for a public highway so as to bind the reversioner. *Regina v. Wismer*, vi. U. C. R. 293.

8. *Semble*: That where the reversion comes at once to the tenant, without any interval of time, his acquiescence in the dedication while a tenant will not bind him in the absence of evidence of acquiescence in the dedication on the part of his landlord. *Ib.*

9. Where therefore a tenant under the Crown had been convicted upon an indictment for taking exclusive possession of the road after he had obtained his patent—the Court refused to give judgment upon the conviction until evidence had been given to shew the Crown a consenting party to the dedication. *Ib.*

HIRING AND SERVICE.

See MASTER AND SERVANT.

HOLIDAYS.

See BILLS OF EXCHANGE ETC., II. 14.
PRACTICE, III. 7.—SUNDAY.

HORSE.

See BAILMENT, 1, 2, 3.—BILLS OF EXCHANGE ETC., VII. 13.

Stolen horse sold at auction, but not in market overt, retaken by legal owner.—Where a horse was stolen from the plaintiff, and bought by the

defendant at public auction, but not in market overt, and the plaintiff afterwards seeing the horse took possession of it, and the defendant immediately retook it: *Held*, that the plaintiff had a right to retake it, no property having passed to the defendant by the sale, and that although it was in his possession only for a moment, yet the property revested in him, and he could maintain trespass against the defendant for the retaking; and that, as the thief was unknown, it was not necessary to shew a prosecution to conviction. *Bowman v. Yielding et al.*, Mich. Term, 3 Vic.

[If the seller of a stolen horse in market overt be entered in the toll-book by a feigned name, the property is not thereby changed. *Gibbs' case*, Owen, 27; 1 Leon, 158, S. C.—*Contra—Wiles v. Moorefoots*, Cro. Eliz. 86.]

HORSE RACE.

See GAMING, 1, 2, 3, 4, 5.

HOUSE OF ASSEMBLY.

See PARLIAMENT.

HUSBAND AND WIFE.

See ARBITRATION AND AWARD, I. 7; VI(2), 8.—ARREST OF JUDGMENT, 6, 13.—BILLS OF EXCHANGE ETC., IV. 7, 18.—BINBROOK (TOWNSHIP OF).—DEED, II. 4, to 10, inclusive. DOWER.—EJECTMENT, II. 11; III. 8; VIII. 10.—EXECUTOR ETC., III. 1.—LIMITATIONS (STATUTE OF), IV. 11.—NEW TRIAL, XI. 4.—PLEADING, II. 37.—VARIANCE, 4.

Necessaries—Recognition of wife by husband.—1. A recognition by a party that A. is his wife is sufficient to charge him with necessaries, although they do not cohabit, having in fact separated, and although she may not stricti juris be his wife. *Harley v. Ham*, Tay. U. C. R. 529.

Liability of husband for goods furnished to wife without his knowledge.—2. A husband having given notice to the plaintiff that he would not be responsible for goods furnished to his wife, who had withdrawn herself from his protection, was held not to be liable for goods furnished to her by the plaintiff without his knowledge after she had returned to him again. *Weaver v. Lawrence*, Easter Term, 2 Vic.

[The liability of the husband for the debts of the wife depends upon whether she can be considered his agent for the purpose of binding him by entering into contracts for goods supplied to her, which is a question for the jury. *Lane v. Ironmonger*, xiii. M. & W. 368.]

Action by wife in husband's name after he had abandoned her.—3. Where a wife, who had been abandoned by her husband for several years, took a lease of some premises without her husband's knowledge, on which the defendant afterwards trespassed, and she brought an action against him in her husband's name: *Held*, that the action was properly so brought. *Jones v. Spence*, i. U. C. R. 367.

Action by wife in her own name.—4. A wife cannot sue in her own name, while her husband is living, for work performed by her. *Murphy v. Bunt et al.*, ii. U. C. R. 284.

Habeas corpus issued by husband to bring up the bodies of his wife and child.—5. Where a wife had left her husband and gone to reside with her father, taking with her her infant child of about seven years old, and the husband obtained writs of habeas corpus to his wife's father to bring up her body, and to his wife, to bring up the child, the Court refused, on the return of the father and daughter to the respective writs that the husband had ill-treated his wife and child, to make any order that they should be delivered to him, but informed the wife that she was at liberty to go wherever she pleased, and to take the child with her.

Regina v. Baxter, and *Regina v. Snooks*, ii. U. C. R. 370.

Fee in wife—Ejectment by husband alone.—6. A husband entitled to land in right of his wife may bring ejectment without her being joined in the action. *Doe dem. Eberts v. Montreuil*, vi. U. C. R. 515.

[See also, EJECTMENT, II. 11.]

IDEM SONANS.

1. *Jacques* and *Jakes* are not necessarily idem sonans, so that the substitution of the one for the other is sufficient. *Jacques v. Nicholls*, Trin. Term, 3 & 4 Vic., P. C., Macaulay, J.

2. *Owen* and *Orrin* are not idem sonans. *Terry v. Mathew*, Trin. Term, 3 & 4 Vic., P. C., Macaulay, J.

IDENTITY.

See CROWN GRANT, 4.

Defence made by son instead of father.—Where in an action against a father process was served upon his son of the same name, and appearance was entered and defence made by the son—the Court held, that a verdict for the defendant was correct, and that whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father. *Killens v. Street*, Mich. Term, 4 Vic.

ILLEGAL ARREST.

See FALSE IMPRISONMENT.

ILLEGALITY.

See ASSUMPSIT, I. 15. — CUSTOMS ACTS, pass.—FRAUDULENT DEEDS ETC.—GAMING—INDEMNITY BOND, 11. — MAINTENANCE (STATUTE OF). — MIDLAND DISTRICT TURNPIKE TRUST, 2, 3.—MONEY HAD AND RECEIVED, 5, 7, 14.—SUNDAY. WITNESS, 16.

Money paid on note given for smuggled goods.]—1. Held, that money paid on a promissory note given for the value of goods which were to have been smuggled into this province, could not be recovered back, although the goods had never been delivered. Anguish v. House, Trin. Term, 1 & 2 Vic.

[See GOODS SOLD, 4.]

Promissory notes—Consideration, smuggled goods.]—2. Where in an action upon several promissory notes the defendant proved that they had been given by him for the price of tea which had been smuggled for him by the plaintiff, and the jury were directed to find for the defendant if they believed that such was the consideration given, and they found a verdict for the plaintiff for the amount of only one of the notes—the Court refused to grant the defendant a rule nisi for a new trial. Beebee v. Armstrong, Hil. Term, 6 Vic.

IMPARLANCE.

See INFORMATION, 8.

IMPOUNDING CATTLE.

See MASTER AND SERVANT, 3.—
TRESPASS, II. 16, 17.

IMPRISONMENT.

See FALSE IMPRISONMENT.

IMPROVEMENTS.

See COVENANT, II(2), 13.

INCIPITUR.

See INTERLOCUTORY JUDGMENT, 5.—
JUDGMENT AS IN CASE OF NON-
SUIT, I. 6.

INCOMPETENCY OF WITNESSES.

See WITNESS, passim.

INCONSISTENCY IN PLEADING

See PLEADING, VII.

INCONSISTENT DEFENCES.

See EJECTMENT, I. 20, 21; VIII. 8.

INDEMNITY ACT.

Staying proceedings.]—1. Proceedings were stayed with double costs under the Indemnity Act, 1 Vic. ch. 12, after judgment by default and assessment of damages. Hyde v. Anger, Easter Term. 2 Vic.

Justification for seizing fire arms.]—2. In trespass for seizing fire arms, a justification by the defendant as an alderman of the City of Toronto, and claiming protection under the Indemnity Act, 1 Vic. ch. 12, was held an answer to the action, although the fire arms had never been returned. Lockhart v. Dixon, Hil. Term, 3 Vic.

INDEMNITY BOND.

See BOND, II. 21.—INTERPLEADER, 5.—SHERIFF, I. 14; IV. 2.

Construction.]—1. A party giving a bond to hold harmless in any actions that may be brought, and to pay all costs and charges thereby accruing, is bound to indemnify, as well against the legal result of any such actions, as for the trouble and expense occasioned to the party to be indemnified by the bringing of any such actions. Hamilton v. Davis et al., i. U. C. R. 176.

Bond to sheriff—Duty and liability of obligors.]—2. Upon an indemnity bond to the sheriff, the obligors must save the sheriff harmless, by taking the

defence of any action against him upon themselves; and judgment against the sheriff is conclusive against the obligors. *Thomas v. Johnston et al.*, iv. U. C. R. 110.

[Also, see cases 13 and 14, *infra*.]

3. Notice to the obligors by the sheriff of his being sued is not necessary, to give him a right of action against them. *Ib.*

4. Construction of an indemnity bond, as to whether it made the obligor liable for old debts, or only for new advances from the date of the bond.—See *Wright v. Benson*, vi. U. C. R. 131.

Action—Plea of de injuria.]—5. In an action brought on a bond of indemnity, a defendant may plead that the payment made by the obligee, was without necessity, and made in his own wrong. *Hamilton v. Davis et al.*, i. U. C. R. 176.

Issue of de injuria—Onus probandi.]—6. Where in debt on an indemnity bond the defendant pleaded that if the plaintiff was damnified she was damnified of her own wrong, and the plaintiff took issue on the plea, and did not assign any breach; and at the trial, the plaintiff not offering any evidence to prove that she was damnified, was non-suited, and on a motion for a new trial, on the ground that the issue was on the defendants, and that they should have begun, the non-suit was held to be right. *Hamilton v. Davis et al.*, ii. U. C. R. 137.

Plea of fraud &c.—Evidence.]—7. Where in debt on a bond, conditioned to save the plaintiff harmless from all damages or suits, either at law or in equity, regarding a certain sum of money, stated to have been advanced by one A. to the plaintiff, through the agency of B., and which said sum of money was also claimed to have been paid to the plaintiff by one C., and now due and owing to him, the defendant pleaded, that the plaintiff, if damnified, was damnified of his own

wrong; and the plaintiff replied, by setting out a breach of the recovery of judgment and execution against him by C., for the said sum of money; and the defendant rejoined, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined; and on the trial, it was shewn that the recovery at the suit of C. had been on admissions made by the plaintiff after the execution of the indemnity bond: *Held*, that such evidence was not sufficient to support the defendant's plea; and the plaintiff having recovered a verdict, the Court refused a new trial, or to arrest the judgment. *Powell v. Boulton*, ii. U. C. R. 487.

Pleadings—Breaches must be answered directly, not by implication.]

—8. Where in debt on bond, the plaintiff assigns breaches in his declaration, the defendant must plead to them directly, and not answer them by implication; as, where in a declaration on a bond to indemnify the plaintiff against certain promissory notes, the breach assigned was, that the plaintiff was compelled to pay a certain sum on the notes, to which the defendant pleaded that he did well and truly pay the notes, the plea was held bad on special demurrer, as answering the breach only by implication. *Bennett v. McDonald*, Easter Term, 3 Vic.

Action by sheriff's executrix—Non-damnificatus—Replication.]

9. Where to a plea of non-damnificatus to an action on an indemnity bond brought by the executrix of a sheriff, which had been given by the defendant to the sheriff, for seizing and selling goods as the property of A. on an execution of the defendant against A., the plaintiff replied a judgment and execution against A. at the suit of the defendant; that the testator was about to return the writ "nulla bona," and that the defendant gave the bond to the testator to seize certain goods as the goods of A.; that the testator did accordingly seize and sell, and that he

paid the money arising from the sale to the defendant; that an action of trespass for seizing and selling the goods had been brought against the testator by their owner, and a judgment for 26*l.* 12*s.* 4*d.* recovered against him in the district court, and so damned—the replication was held good on general demurrer, the Court holding that the allegations were sufficiently certain, that the seizure had been made by the testator on the defendant's writ and before the return day, and that the district court must be presumed not to have exceeded its jurisdiction, without any averment to that effect. *Hamilton v. McFarland*, Easter Term, 3 Vic.

Interest beyond amount of penalty.] 10. A plaintiff on a bond of indemnity cannot recover interest in the nature of damages beyond the amount of the penalty of the bond. *McMahon v. Ingersoll*, Hil. Term, 5 Vic.

Indemnity bond to a magistrate not necessarily void.]—11. A party suspected of stealing a horse is brought up on a warrant before a magistrate; he investigates the alleged larceny and dismisses the charge. The suspected individual pretends no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner, (the party prosecuting,) but before doing so, takes a bond of indemnity from the owner. In an action brought upon this bond, the defendant pleads that the bond is void, relying upon the general policy of the law, that a magistrate should not take such a bond. The plaintiff demurs to the plea: *Held*, plea bad, as it does not shew any statute expressly prohibiting bonds of this description, and does not aver any corrupt purpose, or undue motive on the part of the magistrate to whom it is given. *Ballard v. Pope*, iii. U. C. R. 317.

Assignment of breaches.] — 12. Where in debt on bond conditioned to

save the plaintiff harmless from all demands or suits regarding a certain sum of money, and to discharge all damages, costs and charges that might be recovered in respect thereof, the defendant pleaded non-damnificatus, and the plaintiff assigned two breaches, setting out a judgment for the said sum of money in the condition mentioned, and not specifying any particular sum for which judgment had been recovered: *Held*, on motion in arrest of judgment, that the breaches were sufficiently assigned. *Powell v. Boulton*, iii. U. C. R. 19.

Attornies compelled to sign bond of indemnity to sheriff.]—13. The Court, upon the following paper having been given by them to the sheriff:

“ Q. B.

Wilson et al. v. Hastings.
The plaintiff will indemnify the sheriff on selling goods of Hastings under ven. ex.

(Signed), A. & B.
Attornies for plaintiff.”

Kingston, Feb. 24, 1847:

ordered, upon the application of the sheriff, that the attornies A. & B. should enter into by a day named, or procure two sufficient parties to enter into, a bond of indemnity to the sheriff, to be dated the 4th of March 1847, with the usual conditions to indemnify according to the facts as they existed at that date, the parties &c. to be approved of by the Master, otherwise that A. & B. should pay to the sheriff the damages &c. (see order in full,) he had sustained by reason of selling Hastings' goods under the writ of ven. ex. *Corbett v. Smith et al.*, vii. U. C. R. 13.

Conduct of sheriff cannot be urged as a reason for refusing the above application.]—14. The Court also held that the conduct of the sheriff affecting his right to recover either in whole or in part on the bond, could not be urged as a reason for refusing his application to obtain the bond of indemnity, but

must be left as a matter of defence to, or mitigation of damages in, a suit to be brought by the sheriff on the bond. *Ib.*

INDIAN LANDS.

Form of conviction by commissioners.—1. Commissioners appointed under 2 Vic. ch. 15 to receive informations and inquire into complaints that may be made to them against any person for illegally possessing himself of the lands mentioned in the statute, must shew upon the face of a conviction by them under that act that the lands of which illegal possession had been taken had been actually occupied and claimed by some *tribe or tribes of Indians*, and for the cession of which no agreement had been made with the government. A conviction alleging that the party convicted had unlawfully possessed himself of a portion of the *Crown lands* is bad, as they have no general jurisdiction over such lands. *Little et al. v. Keating*, Hil. Term, 5 Vic.

Evidence of notice.—2. *Semble*: That the recital in a warrant by the commissioners under the act, to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *Ib.*

INDICTMENT.

See HIGHWAY, 1, 2.—*WATER*, 4.

Copy.—A copy of an indictment for high treason may be had by the consent of the Attorney General. *Rez v. McDonell*, Tay. U. C. R. 409.

INDORSEMENT.

I. OF BAILABLE WRITS AND WARRANTS.

II. OF BILLS AND PROMISSORY NOTES

I. OF BAILABLE WRITS AND WARRANTS.

See BAIL, II. 18.—*ESCAPE*, 5.

1. A bailable writ must be indorsed with the sum sworn to. *Armstrong v. Scobell*, iii. O. S. 303.

2. Although it be issued by an attorney in person, still it is necessary that it be so indorsed. *Washburn v. Walsh*, Mich. Term, 3 Wm. IV.

3. The claim must also be indorsed on the bailiff's warrant, as well as on the writ. *Steele v. Lameux*, Easter Term, 6 Wm. IV.

4. An alias bailable writ, however, issued under the statute, need not be indorsed. *Ross et al. v. Balfour et al.*, Mich. Term, 2 Vic.

5. *Semble*: If the sum be mentioned in the affidavit and written in the *margin* of the writ, that would be sufficient, without indorsing it on the back of the writ. *Sligh v. Campbell*, iv. U. C. R. 255.

6. Where the indorsement directed the sheriff to take bail for too large a sum, the Court allowed the indorsement to be amended and reduced to the proper sum, on payment of costs. *Grantham v. Peters*, Easter Term, 3 Vic.

7. A rule to set aside bailable process for want of an indorsement of the plaintiff's claim for debt and costs was refused, where it appeared that the omission had been supplied two hours after the rest, and before the application was made. *Smith v. Smith*, Mich. Term, 3 Wm. IV.

[See next case.]

8. If the plaintiff omit to indorse his claim for debt and costs on a bailable writ, the arrest under the writ will be set aside, although the omission be supplied immediately after the arrest be made. *Gibbs v. Kimble*, i. U. C. R. 408., P. C. Jones, J.

9. On an application to set aside a bailable writ for want of indorsement of the plaintiff's claim, the defendant

must shew by affidavit that the cause of action is a debt. *Leggatt v. Mar-montt*, Easter Term, 3 Vic.

[The rule of court, 3 & 4 Wm. IV. number 3, ordering the indorsement of a statement of the amount of debt and costs on bailable writs, warrants, and process, has been rescinded by the rule of Hil. Term, 3 Vic. number 4.]

II. OF BILLS AND PROMISSORY NOTES.
See BILLS OF EXCHANGE ETC., IV.—
ESTOPPEL, 7.

INDUCEMENT.

See LABEL AND SLANDER, II. 2.—
PLEADING, VIII. 3.

INFANT.

See EJECTMENT, II. 9.—GUARDIAN.
SEDUCTION.

Deed made by, whether void or void-able—Effect of an ejectment.]—1. A deed of bargain and sale made by A. when an infant, is not absolutely void, but voidable by him, either before or after he comes of age. The bringing of an action of ejectment by A. to regain possession of the land, contrary to his deed, is so complete an avoidance of the deed, that it cannot afterwards be confirmed or set up by any subsequent deed or act of A. *Doe dem. Jackson et al. v. Woodruffe*, vii. U. C. R. 332.

Right to maintain assumpsit for dividends on shares which had accrued to him during minority.]—2. Where a father took shares in an association (which had been formed to build a steam-boat to be navigated for the joint benefit of the proprietors) in the name of his son, then an infant, and afterwards and during the minority of child, directed two of the shares to be transferred to the defendant, which was done: *Held*, that the infant could not, on attaining his majority, maintain assumpsit for money had and received, to recover dividends of profits which

had accrued on these shares, and had been received by the defendant. *Hall v. Bidwell*, iii. O. S. 22.

May sue for dower.]—3. An infant demandant may sue in dower, and if an infant tenant be sued, the parol is not allowed to demur. *Phelan v. Phelan*, Dra. Rep. 398.

May defend an ejectment.]—4. An infant will be admitted to defend an action of ejectment, as landlord, by guardian. *Doe dem. Sanderson v. Roe*, Trin. Term, 3 & 4 Vic.

Registry of will when a devisee.]—5. Infancy is not an inevitable difficulty, under the fifteenth section of the Registry Act, so as to preclude the necessity of an infant devisee registering the will within six months from the death of the deviser, so as to avoid a conveyance by the heir-at-law. *McLeod v. Truax*, Hil. Term, 7 Wm. IV.

INFERIOR COURTS.

See DISTRICT COURT. — DIVISION COURT.—FOREIGN JUDGMENT, 13.
JUDGMENT, 18.

INFORMATION.

See CUSTOMS ACTS, 5, 6. — QUO WARRANTO.—SUBPENA, 4.

1. A criminal information must be signed by the master of the Crown office. *Regina v. Crooks*, Mich. Term, 3 Vic.

Criminal information against a magistrate.]—2. A criminal information against a magistrate was refused, where the affidavits on which the motion was made were intituled, and more than two terms had elapsed since the act done, no notice having been given to the magistrate of the intention to move, and the motion having been made too late to allow him to answer the same term. *Busteed v. Scholfield*, Mich. Term, 5 Wm. IV.

For a libel.]—3. Where a party, on moving for a criminal information for a libel, swears that the libel was published of him, and his affidavit set out the libel, which does not charge him in express terms, nor is made to refer to him by innuendo, the Court will grant a rule. *Regina v. Crooks*, Mich. Term, 3 Vic.

Motion.]—4. In such a case as the above, a verified copy of the letter containing the libel is sufficient to move upon, without the production of the original. *Ib.*

For intrusion—Venue.]—5. In an information for an intrusion, the venue may be laid in any district. *The Attorney General v. Dockstader*, Mich. Term, 7 Wm. IV.

For intrusion—Justification.]—6. Where in an information for an intrusion the defendant justifies under a third person, he must shew his own title and that of the person under whom he justifies, and also traverse the title in the Crown. *Regina v. Gould*, Hil. Term, 3 Vic.

Effect of "not guilty" to information for an intrusion.]—7. On an information for an intrusion, the plea of not guilty puts in issue only the question of intrusion, and not the title of the Crown. *Regina v. Munro*, Hil. Term, 6 Vic.

Proceeding in an ex-officio—How styled—Impar lance.]—8. The proceedings in an ex-officio information may be either at the suit of the Queen or the Attorney General, but the defendant cannot be required to plead in vacation upon a rule to plead given in vacation, but is entitled to a regular rule to plead and an impar lance, the rules abolishing impar lance not extending to cases of this kind. *Regina v. Burnham*, Trin. Term, 7 Vic., P. C. Macaulay, J.

Costs of the day.]—9. On putting off the trial of an information for penal-

ties, on the application of the defendant, costs will be imposed in the same manner as in civil cases. *Re v. Ives*, Easter Term, 1 Wm. IV.

INFORMER.

See ARREST OF JUDGMENT, 3.—
FLOUR.

INITIALS.

See ARREST, I. 3, 29.—BILLS OF EXCHANGE ETC., V. 30, 31, 32, 34, 35.—PLEADING, II. 35.

INJUNCTION.

See HABERE FACIAS POSSESSIONEM, 2.—JUDGMENT AS IN CASE OF NON-SUIT, II. 3.

INNKEEPER.

Relation between innkeeper and traveller.]—1. Where a traveller is shewn to have come to an inn as a guest—to have been so received by the landlord—to have stayed there six weeks, and to have paid for his board by the week two days in advance: *Held*, that if dismissed abruptly without cause, he has under these circumstances a right of action against his landlord on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term. *Whiting v. Mills*, vii. U. C. R. 450.

Intendment after verdict.]—2. Where the declaration avers that the defendant came as a guest and was so received, the intendment after verdict will be that the relation thus begun continued till it was interrupted by the

wrongful act of the defendant, nothing being stated to the contrary. *Ib.*

[An innkeeper cannot detain the person of his guest, nor take off his clothes, to secure payment of his bill—*Sunbolf v. Alford*, iii. M. & W. 248; nor is the guest entitled to select a particular room for the purpose of sitting up all night, when the innkeeper offers him a proper room for that purpose—*Fell v. Knight*, viii. M. & W. 269.

INQUIRY (WRIT OF).

See WRITS OF TRIAL AND INQUIRY.

INQUISITION.

See FORCIBLE ENTRY ETC., 2.

*Setting aside inquisition, made under 54 Geo. III. ch. 9, sec. 2.]—*Where an inquisition had been found against the defendant, under the provincial statute 54 Geo. III. ch. 9, the Court refused to set the same aside, on the ground that the lands vested in the Crown by that inquisition had been granted by the Mohawk Indians to the defendant for a term of 999 years, in trust, for the support of his wife (a Mohawk woman) and three children. *Rex v. Phelps*, Tay. U. C. R. 54.

INSOLVENT AND INSOLVENCY.

See ATTORNEY II(1), 12.—BILLS OF EXCHANGE ETC., IV. 1.—CAPIAS AD SATISFACIENDUM, 12.—COMPOSITION.—FOREIGN LAW, 2, 4, 5.—FRAUDULENT DEEDS ETC., passim. INTERLOCUTORY JUDGMENT, 8.—WITNESS, 4.

*Discharge for want of weekly allowance—Affidavit.]—*1. The Court will not grant a rule absolute in the first instance for the discharge of an insolvent debtor for non-payment of the weekly allowance, unless the affidavit state that no interrogatories have been filed by the plaintiff. *Williams v. Crosby*, Tay. U. C. R. 6.

*Affidavit to ground detention after application for release.]—*2. An affidavit to ground the detention of a prisoner who has applied for his discharge for non-payment of his weekly allowance, must not only state his being possessed of property which he became entitled to subsequent to his imprisonment, (or his obtaining his allowance,) but also that he has secreted or fraudulently parted with it. *Williams v. Crosby*, Tay. U. C. R. 16.

*Application for weekly allowance—Affidavit.]—*3. An insolvent prisoner applying for his weekly allowance is sufficiently described in the affidavit as a prisoner in execution in the gaol of the Midland district, at the suit of the plaintiff. *Shuck v. Cranstons*, Tay. U. C. R. 509.

*Service of order for weekly allowance.]—*4. The Court refused to consider the service of an order for payment of an insolvent debtor's weekly allowance under the 2 Geo. IV. ch. 8, sec. 3, as a service under the statute 8 Geo. IV. ch. 8. *Shuck v. Cranstons*, Tay. U. C. R. 604.

*Order for arrears of weekly allowance.]—*5. The Court will not grant an insolvent debtor an order for the arrears of his weekly allowance, which had accrued pending an unsuccessful application for his discharge. *Moran v. Maloy*, Tay. U. C. R. 563.

*Rule for allowance—Filing fresh interrogatories.]—*6. After a rule for weekly allowance, plaintiff cannot file fresh interrogatories and suspend the payment, although he hear of property supposed to have been made away, of which at the time of filing the first interrogatories he had no knowledge. *Hyde v. Barnhart*, Dra. Rep. 56.

*Allowance to prisoner after being on the limits.]—*7. Where a defendant, after obtaining his weekly allowance takes the benefit of the limits, he must give notice of his return to

close custody before he is entitled to further payment. *Hyde v. Barnhart*, Dra. Rep. 210.

Allowance to turnkey.—8. Payment of the weekly allowance to a person acting as turnkey is good. *Hyde v. Barnhart*, Dra. Rep. 56.

Affidavits contradicting prisoner's answers.—9. Affidavits may be received contradictory of the answers of a prisoner in execution, to interrogatories filed to deprive him of the weekly allowance, and in answer to an application for his discharge; and the Court will not discharge the prisoner, unless they are satisfied that he has no means of support, and has not fraudulently secreted or conveyed, &c. *Montgomery v. Robinet*, ii. O. S. 506.

Refusal to discharge prisoner on death of plaintiff.—10. The Court refused to discharge a defendant in execution, where the plaintiff died, and the weekly allowance was tendered by a person who had usually paid it, although no administration had been granted. *Beard v. Orr*, Dra. Rep. 253.

Affidavit to obtain weekly allowance.—11. An affidavit by a defendant in close custody, that he is not worth five pounds besides the necessary wearing apparel, is sufficient to obtain a rule for the weekly allowance. *Malone v. Handy*, Hil. Term, 6 Wm. IV.

When defendant in custody for less than 100l., entitled to his discharge.—12. A defendant in custody in execution for a sum not exceeding 100l., is not entitled to his discharge under 5 Wm. IV. ch. 3, unless he has been six months in confinement in gaol. *Denham v. Talbot*, Hil. Term, 6 Wm. IV.

Excuses for non-payment of allowance.—13. It is not a sufficient excuse for the non-payment of the weekly allowance that the defendant is in custody in other suits, on which he receives the allowance, or that a co-de-

fendant has put in bail after the order for the weekly allowance was granted. *Truscott et al. v. Walsh et al.*, Hil. Term, 6 Wm. IV.

Relief, under 5 Wm. IV. ch. 3.—14. An insolvent debtor charged in execution in case for seduction, is entitled to relief under 5 Wm. IV. ch. 3. *Perkins v. O'Connolly*, Hil. Term, 6 Wm. IV.

Waiver of objections to defendant's answers.—15. Payment of the weekly allowance, after answers have been filed to the interrogatories put by the plaintiff, is a waiver of any objections to the answers, and the plaintiff cannot file further interrogatories without leave of the Court. *Malone v. Handy*, Trin. Term, 6 & 7 Wm. IV.

When a defendant in execution for less than 20l. is entitled to his discharge.—16. A defendant in custody for a debt not exceeding 20l. is entitled to his discharge under 5 Wm. IV. ch. 3, on satisfying the Court that he has been imprisoned six months, but the rule is not absolute in the first instance. *King v. Keogh*, Mich. Term, 7 Wm. IV.

Right of prisoner rendered by his bail to allowance.—17. A defendant rendered by his bail after the return of non est inventus to the capias ad satisfaciendum, is not in custody on mesne process, nor is he charged in execution so as to obtain the weekly allowance. *Lyman et al. v. Vandecar*, Mich. Term, 2 Vic.

Requisites of answers to interrogatories.—18. The answers of a defendant in custody to interrogatories put to him by the plaintiff after an order for the payment of the weekly allowance, must not only be full but satisfactory. *Sanderson v. Cameron*, Easter Term, 2 Vic.

Time for plaintiff to file interrogatories.—19. The plaintiff may file interrogatories after he has made default in the payment of the weekly allowance, and before the defendant

has made any application for his discharge. *Elwood v. Monk*, and *Butler v. Thomas*, Mich. Term, 3 Vic.

Notice by prisoner under 5 Wm. IV. ch. 3.—20. The notice required to be given by an insolvent debtor in execution of his intention to apply for his discharge under 5 Wm. IV. ch. 3, may be given before the full period of his imprisonment, according to that act, has expired. *McPherson v. Campbell*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

21. Where an insolvent debtor in execution applies for his discharge from custody under 5 Wm. IV. ch. 3, he must shew that he has given the plaintiff notice of his intended application. *Averill et al. v. Baker*, Mich. Term, 5 Vic., P. C. Jones J.

Allowance in civil suit where party imprisoned on a criminal charge.—

22. An insolvent debtor in custody on a criminal charge cannot obtain a rule for the weekly allowance in a civil suit. *Thompson v. Hughson*, Mich. Term, 6 Vic., P. C. Jones, J.

Allowance to a party imprisoned for costs.—23. The Court will order the weekly allowance to a party imprisoned for non-payment of costs. *Doe dem. Vancott v. Reid*, iv. U. C. R. 125.

Release of prisoner from actions—Confirmation by Court of Review.—

24. It is not necessary under the 4th 5th and 24th clauses of 8 Vic. ch. 48, that the judge's order under the insolvent law, should be confirmed by the Court of Review, before it can operate as a discharge of the insolvent from actions. *Ferrie et al. v. Lockhart*, iv. U. C. R. 477.

Final order.—25. The final order must comprise an order as well for the distribution of the effects of the bankrupt, as for protecting his person and goods from process. *Ib.*

10 & 11 Vic. ch. 15—*What acts make an insolvent.*—26. A prisoner

in execution for debt, cannot, by assigning his effects in trust for such creditors as choose to come in, and on receiving a dividend give him an absolute discharge, make himself an insolvent debtor in the terms of the statute 10 & 11 Vic. ch. 15. *Gillespie et al. v. Nickerson*, vi. U. C. R. 628.

INSPECTION OF BOOKS.

See CORPORATION, 1.—MANDAMUS, 6.

INSPECTION OF FLOUR.

See FLOUR.

INSURANCE.

See NEW TRIAL, I. 17.

Action on policy—Affidavits—Declaration.—1. Where in the declaration in an action against an insurance company it was averred that certain affidavits necessary, according to the terms of the policy, were made by A. and B.: *Held*, that such averment was material, and that proof of affidavits made by other persons was insufficient. *Alderman v. West of Scotland Insurance Company*, Hil. Term, 6 Wm. IV.

Losses by civil commotion or riot excepted in policy—Declaration.—

2. Where in a policy of fire insurance, losses by fire arising from riot or civil commotion were excepted, and in an action on the policy it was negatived in the declaration that the loss arose from civil commotion, but loss by riot was not negatived: *Held*, that the declaration was bad on general demurrer, as the terms riot and civil commotion were not synonymous. *Condlin v. The Home District Mutual Fire Insurance Company*, Hil. Term, 6 Vic.

Fraud &c. avoid the policy.—3. Any fraud, concealment or misrepresentation by a party effecting a policy of insurance of a matter material to

be known by the insurer, will avoid the policy. *McFaul v. Montreal Inland Insurance Company*, ii. U. C. R. 59.

[Acc. *Wainwright v. Bland*, i. M. & W. 32. Also see case 8, *infra*.]

Particulars of loss.—4. Where there is a condition in a policy that the particulars of the loss shall be given to the insurer under oath, within a specified time after the loss has occurred, the insured cannot recover on the policy unless the condition has been complied with. *Ib*.

Action on marine policy—Necessary averments.—5. In an action on a marine policy it is necessary to aver that the loss occurred during the continuance of the policy; and if the policy extend only over certain waters, and the vessel is stated to have been lost on a voyage commenced from a certain place, such place must be alleged to be within the waters over which the policy extended. *Mittleberger v. The British America Fire and Life Assurance Company*, ii. U. C. R. 439.

6. Where there is an express covenant in a policy that a vessel shall be seaworthy and well found &c. at all times during the continuance of the policy, it must be so expressly averred in an action on the policy. *Ib*.

Recovery for total loss, facts shewing only partial loss—New trial.—

7. Where in an action on a marine policy the plaintiff recovered as for a total loss, the facts shewing only a partial loss, which, however, was not so distinctly left to the jury, the Court granted a new trial without costs. *Davis v. The St. Lawrence Inland Marine Insurance Company*, iii. U. C. R. 18.

Concealment, or omission of facts.—8. Where a party insuring a vessel omits to mention to the underwriters that she has *then* sailed, the omission, though the insured knew the fact, will not vitiate the policy, unless the vessel be at the time of the insurance what

is called a "missing ship." *Aliter*: If the insured, when *expressly questioned* as to the fact, says, not by way of *opinion or expectation*, but positively, that the vessel has not sailed when she really has. *Semble*: That there is a distinction to be taken when the owner of the cargo, who is not at the same time the owner of the vessel, is insuring his cargo, as to the probability of any positive statement being made to the underwriters with respect to the time of the vessel's sailing. *Perry v. British America Fire and Life Assurance Company*, iv. U. C. R. 330.

As to care and skill of captain invalidating marine policy.—9. *Semble*: That with respect to the cargo insured, as well as the vessel itself, a marine policy may, by an express (though not by an implied) agreement, become legally invalid for the want of care and skill on the part of the captain and crew in navigating the vessel; and *semble*, that the wording of this policy amounted to such an express agreement. *Gillespie et al. v. British America Fire and Life Assurance Company*, vii. U. C. R. 108.

Seaworthiness—Particular navigation—Forfeiture.—10. *Semble*: That upon the general principles of the law applicable to the construction of marine policies, the seaworthiness of a vessel is a fact to be considered with reference to the particular navigation in which the loss of the vessel may occur—as for instance, if a vessel insured between Toronto and Quebec were lost by stranding in the river St. Lawrence, the question for the jury to determine would be, not was she well found and seaworthy for the navigation of the open lake Ontario, but was she well found and seaworthy for the navigation of the river St. Lawrence: and if in the opinion of the jury she was suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated,

unless it be so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel for either navigation an absolute cause of forfeiture, without reference to the particular navigation in which the loss should occur. *Ib.*

Partial insurances—What amount insured entitled to—Insured can recover for certain injuries to property other than by fire.]—11. Where a person insures upon his house or goods for a part only of their value, and suffers a loss equal to the full amount insured, that sum, unless the policy be specially framed, must be paid by the insurer, and not merely such a proportion of that sum as would correspond with the proportion between the sum insured and the whole value of the property on which the insurance was effected. The condition in the policy "that in case of the removal of the property to escape conflagration, the company will contribute ratably with the insured and other companies interested, to the loss and expense attending such act of salvage," is not a condition which will have the effect of changing in this respect the law of partial insurance. *Semble*: That in the form adopted in ordinary policies, injuries to goods by wet, or in any manner from the exposure during the confusion of the fire before they can be got to a place of safety, and goods lost or stolen in the confusion arising from the fire, and of the destruction, injury or loss, of which the fire can be said to be the proximate cause, are within the terms of the policy, but, in suing for such loss, the plaintiff must describe the occasion and manner of loss according to the fact. *Thompson v. Montreal Insurance Company*, vi. U. C. R. 319.

Fire insurance—Effect of mere change of occupation of the premises insured, without notice, &c.]—12. *Semble*: That the mere change in the occupation of a house insured against

fire, without notice, &c., there being no other alteration in the manner or purpose of occupation, will not avoid a policy of insurance effected under the provisions of the act 6 Wm. IV. ch. 18, incorporating insurance companies. *Hobson v. The Wellington District Fire Insurance Company*, vi. U. C. R. 536.

What is an alienation.]—13. *Semble*, also, that a demise of the house insured for one year is not "an alienation" within the act. *Ib.*

INTENDMENT (LEGAL.)

See ARBITRATION AND AWARD, V. 1. ARREST OF JUDGMENT, 13.—BOND, I. 2; II. 11.—INNKEEPER, 2.

INTEREST.

See ARBITRATION AND AWARD, IV (3), 4.—BILLS OF EXCHANGE ETC., I. 16; VIII. 6.—INDEMNITY BOND, 10.—JUDGMENT, 20.—PAYMENT, 9.

Interest on judgments.]—1. The Court will not order satisfaction to be entered upon a judgment, without payment of interest. *Logan v. Secord*, Tay. U. C. R. 225.

Method of calculation.]—2. The method usually adopted in making out an account between debtor and creditor upon a loan of money—viz., that of charging first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest—is not the correct way of arriving at the balance. It is so much in favor of the debtor, that where there has been a long arrear of interest, and payments made on account of the debt not covering the interest alone, the debtor in a few years, without adding any payment

in the mean time, will make his creditor his debtor to a very large amount. *See James McGregor et al. v. Gaulin et al.*, iv. U. C. R. 378.

INTERLOCUTORY JUDGMENT.

See APPEARANCE, 1, 4, 5.—ASSESSMENT OF DAMAGES, 5, 6.—BANKRUPT AND BANKRUPTCY, 9.—DEMURRERS, 4, 5.—IRREGULARITY, 13, 15, 21.—JUDGE (IN CHAMBERS), 4.—PRACTICE, I. 4, 7.

Breach of undertaking to plead issuably.—1. Where the defendant obtained time to plead by a judge's order, "on the usual terms," and the plaintiff, after pleas pleaded, took issue upon some and demurred to others, and the defendant obtained an order to amend his pleas or join in demurrer, with further time to rejoin "upon the usual terms," and served both his orders, but afterwards, and within the time in which he would have been entitled to rejoin, without any order for further time, filed a special demurrer to the plaintiff's replication, upon which the plaintiff signed interlocutory judgment: *Held*, that the interlocutory judgment was regular, the defendant being bound by his order for further time to rejoin after having served it, and the special demurrer being in contravention of the undertaking to rejoin upon the usual terms. *Strathy v. Crooks*, Mich. Term, 6 Vic., P. C., Macaulay, J.

2. Where a defendant obtained a month's time to plead, on the usual terms, and afterwards filed a special demurrer, setting out in the margin, under the new rules, the causes of demurrer, which were the same as those stated as special grounds, but were not referred to as those specially set out, but they were such as might have been urged on general demurrer, if tenable, and the plaintiff signed interlocutory judgment: *Held*, that the judgment

was regular, and a rule obtained by the defendants to set it aside was discharged, but without costs. *The King's College v. Hawley et al.*, ii. U. C. R. 381.

3. Covenant on an indenture, made on the 10th of November 1844, assigning as a breach that at the time of the making of the indenture the defendant had no title. The defendant, who was under terms to plead issuably, pleaded a derivative title to him at a period prior to the making of the said indenture. The plaintiff signed judgment, treating the plea as a nullity: *Held*, judgment regular. (Robinson, C. J., dissentiente). *Dickson v. Boulton*, v. U. C. R. 558.

[An issuable plea is that which at once puts the merits of the cause in issue, either on the facts or the law. *Steele v. Harer*, xiv. M & W. 139.]

Non-joinder in abatement to a new assignment—Nullity.—4. A. sues B. in assumpsit upon the common money count, for money paid.—B. pleads that he made the promise in the declaration mentioned jointly with one C., and that C. made a deed in fee simple of certain land, which A. accepted in satisfaction of the said debt. A replies by new assigning, that the money sued for is a different sum of money from that mentioned in the plea. B. rejoins by pleading in abatement the non-joinder of C.—A. treats the rejoinder as a nullity, and signs interlocutory judgment: *Held*, interlocutory judgment well signed, the plea in abatement being too late and a nullity. *Eberts et al. v. Larned*, v. U. C. R. 264.

Incipitur.—5. *Semble*: An interlocutory judgment is irregular without an incipitur on the roll. *Ballard v. Wright*, ii. O. S. 218.

Leave to amend declaration—Signing interlocutory judgment without amendment.—6. Where the plaintiff, after notice of trial given in an action of debt, had leave to amend his declaration in one of the counts, and

not having served the amended declaration nor any new demand of plea, signed interlocutory judgment, and afterwards entered final judgment and issued execution, the proceedings were set aside for irregularity. *Randall qui tam v. Taggart*, iv. O. S. 2.

Judgment improperly styled.]—7. An interlocutory judgment, in which the cause is not properly styled, is insufficient to sustain a notice of assessment; and in such a case it is not necessary to give a notice of an intention to move to set aside the proceedings before assessment of damages; but if it be not given, the proceedings will be set aside without costs. *Allanson v. Johnson*, Mich. Term 6 Wm. IV.

Appearance, when a nullity.]—8. Where the defendant had been arrested and afterwards discharged from custody for the non-payment of the weekly allowance without entering any appearance, and the plaintiff entered an appearance for him, as if on serviceable process, and filed and served a declaration, and signed interlocutory judgment, the Court considered the appearance entered by the plaintiff a nullity; but, as the defendant did not move promptly against the next proceeding, the interlocutory judgment was set aside without costs, the defendant having filed an affidavit of merits. *Homer v. Brousseau*, Easter Term, 4 Vic., P. C. McLean, J.

Irregularity in judgment—Notice of grounds of objection—other objections afterwards taken.]—9. Where a plaintiff declared in assumpsit on several counts, and the defendants demurred to one count and pleaded the general issue to the others, and the same term the plaintiff amended the count demurred to, and two full days after the service of the amended declaration signed interlocutory judgment on the whole record and assessed damages, having first received notice from the defendant of an intended motion to set aside the judgment as

signed *too soon*, the Court would not afterwards allow the objection that the judgment to the whole declaration was wrong, as pleas were filed to part. *Bird v. Macaulay et al.*, i. U. C. R. 411.

Signed too soon—How cured.]—10. A plaintiff, apprehensive that he may have signed interlocutory judgment too soon, cannot cure his irregularity by filing and serving a replication and notice of trial conditionally to take effect in case the judgment should be set aside. *McPherson v. Dickson*, v. U. C. R. 476.

Waiver of irregularity.]—11. *Seem*, however, that the defendant, by arguing the conditional replication on a demurrer, may waive its irregularity. *Ib.*

Order staying proceedings—Judgment signed by attorney without being aware of it.]—12. An interlocutory judgment signed in the country after the return of a judge's summons in town, which operated as a stay of proceedings, but of which the attorney could not have been made aware, was set aside as irregular, but without costs. *Carlisle v. Niagara Harbor and Dock Company*, Mich. Term, 1 Vic.

Time for signing, in deputy's office.]—13. It is not irregular to sign interlocutory judgment in the office of a deputy clerk of the Crown in the country, at an hour when by rule of Court the principal office in town is not open. *Hall v. Hunter*, Hil. Term, 2 Vic.

Interlocutory judgment signed too soon—Entry of waiver.]—14. When a month's time to plead had been given, and the plaintiff signed interlocutory judgment before the month had expired, but afterwards entered a waiver in the interlocutory judgment book in the Crown office, but gave no notice of the waiver to the defendant's attorney, and after the month had expired, no plea having been filed, signed interlocutory judgment again and

assessed damages, his proceedings were held regular, the entry of the waiver in the book being a sufficient notice; but the interlocutory judgment was set aside on the merits, on payment of costs. *Wynn v. Palmer*, Easter Term, 3 Vic.

[Mode of signing interlocutory judgment—See rule of Hilary Term, 13 Vic. number 26.]

INTERPLEADER.

See FRAUDULENT DEEDS ETC., 3.

Application must be made before return day of the writ.—1. A sheriff who has seized under a fi. fa. goods and chattels, the property in which is disputed, will not be relieved under the statute 7 Vic. ch. 30, when the application for relief is not made until after the return day of the writ, unless the delay be satisfactorily explained. *Cole v. McFaul*, i. U. C. R. 276.

Effect of default in appearing after rule.—2. Where a sheriff obtains a rule under the statute 7 Vic. ch. 30, calling upon parties to sustain their claims to property seized under execution, and one party fails to appear, his claim as against the sheriff is barred, and the party appearing is entitled to have his costs paid by the party failing to appear. *Johnson v. Baldwin*, i. U. C. R. 280.

Sheriff must be in possession of goods before application.—3. A sheriff cannot be relieved from the effect of an adverse claim under the Interpleader Act, if he has not seized the goods which are the subject of the claim in execution. *Goslin v. Tune*, ii. U. C. R. 177.

Agreement for the sale of timber—Ownership of the timber.—4. Upon an agreement between A. and B., "that certain timber should be marked for B. as made, and should be delivered as fast as made to his agent, and should be to all intents and purposes

his property—to be held in security for his advances:" *Held*, that—the timber having been all made for B., and marked for him, part of it delivered, and all brought out of the woods and taken possession of by B. and sold to C., who had actual possession for many weeks with the knowledge and apparent consent of A.—such timber could not afterwards be seized by the sheriff as the property of A., merely because B. had not sent out an agent to receive the whole of it in the woods. *Dunning v. Gordon*, iv. U. C. R. 399.

Sheriff selling goods in violation of interpleader order.—5. The sheriff, upon the plaintiff refusing to indemnify, applied to the Court for an interpleader order, which was granted. Pending the interpleader issue the plaintiff offered the indemnity, and the sheriff sold and paid the proceeds to the plaintiff: *Held*, upon an application by the party in whose favor the interpleader issue had been found by the jury, that the sheriff was liable to an attachment for selling the goods in violation of the interpleader order, obtained at his instance and for his own protection. *Henderson v. Wilde*, v. U. C. R. 585.

Making up the issue.—6. Where no time has been limited, by an interpleader order, for the plaintiff to make up the issue between the parties, the Court will order the issue to be made up by the claimants on or before a certain day, or on default thereof, to be barred from prosecuting the claim. *Shiels v. Davis*, vi. U. C. R. 628.

Feigned issue—Non-suit.—7. A plaintiff may be non-suited on the trial of a feigned issue under the Interpleader Act. *Bryson et al. v. Clandinan*, vii. U. C. R. 198.

INTERROGATORIES.

See INSOLVENT ETC., 1, 6, 9, 15, 18, 19.

INTRUSION.

See INFORMATION, 5, 6, 7.

Crown grant—Disseisin of grantee.—A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the King, after grant made, is not a disseisin of the grantee. *Doe dem. West v. Howard et al.*, Hil. Term, 7 Wm. IV.

INVOICES.

See CARRIER, 9.

IRREGULARITY.

See ABSCONDING DEBTOR, 26. — AMENDMENT, II. 12.—APPEARANCE, 1, 3, 7, 9.—ARREST, I. 19, 24, 35; IV. 9, 16.—ASSESSMENT OF DAMAGES, 3.—BAIL, III. 1.—CAPIAS AD RESPONDENDUM, 3.—CASSETUR BILLA.—DEMURRERS, 17. EJECTMENT, III. 10; IV(1), 1, 5; V. 8.—EXECUTION, 8.—INTERLOCUTORY JUDGMENT, 6, 9, 10, 11, 12, 13, 14.—JUDGE (IN CHAMBERS), 3. JUDGMENT, 4, 25.—JUDGMENT OF NON PROS, 3, 4. —JURY, 6, 7.—NOTICE OF TRIAL, 1, 2, 6, 9, 14.—PRACTICE, I. 14, 16; II. 16, et seq.; III. 6.—RECORD (NISI PRIUS), 8, et seq.—REPLEVIN ETC., 1.—SCIRE FACIAS, 4, 5.—SHERIFF, II. 4, 5, 13, 14.—VENDITIONI EXPONAS, 1. VERDICT, 11.—WAIVER.—WRITS OF TRIAL ETC., 2, 3, 4, 5.

Necessity for prompt applications—Application in chambers and then in banc.—1. A party applying to set aside proceedings for irregularity must come promptly, and if he apply to a judge in chambers, he cannot afterwards move in term, on any other grounds than those taken in his first application. *Arnold v. Fish*, Easter Term, 6 Wm. IV.

[See ARREST, IV. 9, and INTERLOCUTORY JUDGMENT, 8; also case 15, infra.]

Service of declaration before appearance.—2. A declaration cannot be regularly delivered before common bail filed, or appearance entered; and the irregularity is not cured by an attorney accepting the declaration, without denying that he is attorney for the defendant. *Ballard v. Wright*, ii. O. S. 218.

Setting aside arrest—More asked for than could be granted.—3. Where a motion was made to set aside a writ and the arrest for irregularity, and to discharge the prisoner out of custody, or to deliver up the bail bond to be cancelled, as the case might be—the Court made the rule absolute with costs, although more was asked than could be granted. *Armstrong v. Scobell*, iii. O. S. 303.

Effect of defendant pleading pending an application.—4. When, pending a motion to set aside proceedings for irregularity, the defendant pleaded, in consequence of which the plaintiff proceeded to trial—the Court refused to set aside the verdict, or otherwise to interfere, though no defence made, no actual merits being disclosed on affidavit. *Simpson v. Mathison*, and *Ward v. Ward*, iii. O. S. 305.

Passing record without pleas in the office.—5. The defendant having filed his pleas, the plaintiff on going to pass his record and not finding them in the office, caused them to be entered on record, and passed the record without the pleas being in the office, and gave notice of trial and tried the cause, no defence having been made, the Court set aside the proceedings for irregularity. *McKinnon v. Johnston*, iii. O. S. 298.

Appearance—Pleading.—6. *Semble*: It is not irregular, after an appearance in person, to plead by an attorney. *Soper v. Draper et al.*, ii. O. S. 289.

Issues on some pleas and not on others—Trial.—7. It is irregular for a plaintiff to proceed to trial, where

there are issues joined on some pleas and not on others. *Ferris v. Dyer et al.*, iv. O. S. 6.

Settlement of suit—Plaintiff's attorney proceeding without authority.]—8. Where, after process served, the parties came to a settlement, and the plaintiff agreed to pay his own costs, but notwithstanding, the attorney went on, thinking that the defendant should pay the costs, the proceedings were set aside for irregularity. *Parent v. M'Mahon*, iv. O. S. 120.

Several defendants—Appearance by attorney for one—Service of papers.]—9. Where one of two defendants appears by attorney, and the other does not, it is irregular to serve papers for both on the attorney of the one. *Huff v. McLean et al.*, Hil. Term, 6 Wm. IV.

Proceedings without entry of appearance—Waiver of irregularity.]—10. The plaintiff accepting a plea and giving notice of trial, cannot afterwards object that an appearance has not been entered for the defendant. *McLean v. McDonald*, iii. U. C. R. 126.

Curing irregularity by entry of nolle prosequi.]—11. Where in trespass against several defendants the plaintiff went to trial after he had received notice that the proceedings were irregular as to one of two defendants: *Held*, that he could not, after verdict, cure the irregularity by entering a nolle prosequi as to that defendant. *Campbell v. Bruce et al.*, Mich. Term, 7 Wm. IV.

Notice—Costs.]—12. Where a notice is required to be given of any irregularity, and the notice does not describe what the irregularity is, if the proceedings be set aside costs will not be allowed. *Henderson v. Jones*, Hil. Term, 3 Vic.

Judgment for want of pleas to an amended declaration.]—13. Where the defendant demurred to some counts of the plaintiff's declaration, and pleaded as to the others, and the plaintiff

had leave to amend the counts demurred to, and filed and served an amended declaration, and no new pleas being filed signed interlocutory judgment to the whole declaration, the interlocutory judgment was set aside for irregularity, the pleas standing good to part of the declaration, but without costs, as there was reason to believe that the plaintiff's attorney had misunderstood the terms of the arrangement made between the defendant's attorney and himself with respect to the filing of new pleas. *Hamilton v. Thompson*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Issue of execution against goods after levy on lands.]—14. It is irregular to issue a writ of fieri facias against the goods of the defendant after a levy has been made on a writ against his lands, which has not been returned, and a judgment creditor who is prejudiced, may come in to set such writ aside. *Stevens v. Sheldon et al.*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Delay in objecting to irregularity.]—15. Where a declaration was served before it was filed, and the defendant, being aware of the error, allowed interlocutory judgment to be signed and notice of assessment given: *Held*, that he was too late to object to the irregularity. *Proctor v. Young*, Hil. Term, 4 Vic.

Service of papers on defendant personally after appearance by attorney.]—16. Where the defendant had appeared by attorney, and the plaintiff after declaration signed interlocutory judgment and served notice of assessment of damages on the defendant himself, and assessed damages upon that notice—the Court held the assessment irregular, and that it was not necessary that any notice should be given to the plaintiff of the defendant's intention of moving to set aside the proceedings for such irregularity. *Bishop v. Lindsay*, Hil. Term, 5 Vic.

Necessity for raising all objections on first motion.—17. Where in an action against an absconding debtor proceedings had been carried to judgment and execution against his lands, and he moved to set aside the execution for a variance between it and the judgment, and the plaintiff was allowed to amend: *Held*, that he was afterwards too late to object to irregularities in earlier proceedings in the cause, as he should have brought them forward on his first motion. *Dougall v. Lewis*, Trin. Term, 5 & 6 Vic., P. C. Macaulay, J.

Irregular service of process—Proceedings set aside.—18. Where a sheriff's officer served a writ on the defendant, who informed him that the writ was intended for another person, and the officer took back the writ to serve upon the other person, the defendant agreeing that if he was wrong in his supposition that he would consider the service as good, if the writ were left at the house of a third person named, and the officer did not serve the other party, nor leave the writ as directed, but having made affidavit of the service, the plaintiff proceeded with the cause, the service and subsequent proceedings were set aside for irregularity. *Erwin v. Powley*, ii. U. C. R. 270.

Irregular assessment set aside.—19. In an action of trespass quare clausum fregit, the defendant's attorney, seeking the advice of counsel upon some difficult points of pleading that were likely to arise in the defence, undertook to allow the plaintiff's attorney to enter his record at any time during the assizes; the defendant's attorney pleaded a special plea, to which the plaintiff new assigned, and the defendant then pleaded specially to the new assignment, and the plaintiff demurred specially; the defendant thereupon gave the plaintiff notice that if he proceeded to assess contingent damages he should move to set aside

the proceedings for irregularity; the plaintiff proceeded to assess his damages, and the Court made a rule absolute to set the assessment aside without costs. *Hodgkinson v. Donaldson*, ii. U. C. R. 274.

Time for giving notice of motion.—20. Where notice of intention to move, on the ground of irregularity in proceedings prior to the execution of a writ of inquiry is required in England to be given two days before the execution of the writ of inquiry, a similar notice shall be given in this Court not later than the first day of the assizes at which the damages are to be assessed. *Dougall v. Maclean*, Dra. Rep. 330.

When defendant must promptly move, notice being insufficient.—21. If an interlocutory judgment be irregularly signed, and the defendant has time to move against it in vacation before damages are assessed, he *must move*; and if he only gives notice of his intention to move against it, in the event of further proceedings being taken upon it, his motion will not be allowed to prevail after damages have been assessed. *Ketchum v. McDonnell et al.*, ii. U. C. R. 378.

Setting aside proceedings of inferior court after removal to Queen's Bench.—22. Where proceedings in a court of inferior jurisdiction had been removed into the court of Queen's Bench, a rule nisi, to set aside the proceedings had in such court, for irregularity, will be granted. *English v. Everett*, i. U. C. R. 276, P. C. Jones, J.

[NOTE.—The rule of Hilary Term, 13 Vic. number 22, orders that no application to set aside process or proceedings for irregularity, shall be allowed, unless made within a reasonable time; nor if the party applying has taken a fresh step after knowledge of the irregularity.]

ISSUABLE PLEAS.

See ASSESSMENT OF DAMAGES, 5.—
INTERLOCUTORY JUDGMENT, 3

ISSUE.

See INTERPLEADER, 6.—JUDGMENT AS IN CASE OF NON-SUIT, I. 7, 8, 9, 10, 11; III. 2, 3.—NUL TIEL RECORD, 1.

ISSUES (COSTS OF).

See COSTS, III.

JOINDER.

I. OF COUNTS.

See DEMURRAGE, 2.—DEMURRERS, 13, 15.—PLEADING, X.

II. OF PARTIES.

See ABATEMENT, *passim*.—ACTION, 6.

JOINT STOCK COMPANY.

See BILLS OF EXCHANGE ETC., VII. 5.—CORPORATION, 1.—INFANT, 2.

Notes suppressed by 7 Wm. IV. ch. 13.—1. A partner in a joint stock company, the notes of which are suppressed by 7 Wm. IV. ch. 13, having retired their notes which were in circulation after the suppression, cannot put them into circulation again so as to bind the partnership. *Hall v. Buck*, Trin. Term, 2 & 3 Vic.

Proof of liability of a member.—2. In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability, without producing the partnership deed; and when a company is formed for purposes which do not render the drawing and accepting of bills of exchange and promissory notes necessary, it will be sufficient to establish the liability of a partner, on bills or notes drawn or accepted in the name of the company by their secretary, that while he was a partner the secretary was in the habit of so drawing and accepting bills, which were afterwards paid with his concurrence and admission of liability. *Lee v. Mc-Donald*, Hil. Term, 4 Vic.

Recovery of loan made from the joint funds by one member to another.—3. A member of a joint stock company, not incorporated, lending, with the assent of the company, a sum of money out of the joint fund to another member, and taking from him a promissory note payable to himself individually for re-payment, can recover on the note, notwithstanding that the funds were advanced from the common stock. *Comer v. Thompson*, iv. O. S. 256.

Failure of company—Right of contributor to recover back his money.—

4. A party contributing to some joint stock adventure which does not go into effect, may be allowed to recover back his money in an action for money had and received; but the Court must, in each case, see the circumstances which give him a just right to reclaim back his money—the Court held, that in this case no such right was shewn. *Gilpin v. Greene*, vii. U. C. R. 586.

JOINT TENANCY.

See ACCOUNT (ACTION OF), 1, 2.—EJECTMENT, II. 2.—ESTATE, 11.

Mortgagees.—1. Mortgagees are not trustees under 4 Wm. IV. ch. 1, sec. 48, so as to take jointly, when the deed is silent as to the tenancy created. *Doc dem. Shuter et al. v. Carter*, Hil. Term, 2 Vic.

Release by one to another—Estate.—2. A release by one joint tenant to another conveys a fee, without words of inheritance. The judgment given on demurrer on other points in this case, upheld. *Ruttan v. Ruttan*, Mich. Term, 4 Vic.

[See ESTATE, 11.]

Severance of tenancy.—3. A conveyance in fee to A. by B., the survivor of two joint tenants, “of his undivided half of the lot,” puts an end to the joint tenancy and makes the

joint tenant B. till he dies a tenant in common with A., and B. by his will may devise the moiety he has not by his deed conveyed to A. *Doe dem. Eberts v. Montreuil*, vi. U. C. R. 575.

JOINT TRESPASSERS.

See ARBITRATION AND AWARD, IV (3), 8.—TRESPASS, I. 21; II. 6.

JUDGE (AT NISI PRIUS).

See AMENDMENT, II. passim.—EVIDENCE, VIII.—SUBPENA, 2, 3.

JUDGE (IN CHAMBERS).

See DEMURRERS, 16.—SHERIFF, II. 25, 26.

Power of judge.—1. A judge in chambers has power to set aside judgment and execution against the casual ejector in ejectment. *Popplewell dem. Capreol v. Roe*, Trin. Term, 6 & 7 Wm. IV.

[So *Brown v. Jones*, xv. M. & W. 191.]

Setting aside non pros.—2. A judge in chambers has power to set aside a judgment of non pros. *Hart et al. v. Boyle*, Mich. Term, 5 Vic.

Appeal from chambers to full court.—3. The Court will very rarely indeed entertain an appeal against the decision of a judge in chambers declining to give effect to a motion for irregularity. *Gilmour et al. v. Wilson et al.*, iv. U. C. R. 154.

Allowing defendant to plead after interlocutory judgment—Reference to Nisi Prius.—4. *Semle*: That where an interlocutory judgment has been signed and the plaintiff is preparing for his assessment of damages in an outer district, a judge in chambers, upon an application made to him immediately before holding the assizes in the outer district, will not interfere to let the defendant in to plead, but

will refer the parties to the judge of assize about to open the assizes in the outer district. *Bellows v. Condee et al.*, iv. U. C. R. 346.

Power of judge to open an order granted by himself.—5. A judge sitting in chambers has authority in his discretion to open again an order which has been granted by himself, or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts, or from the misconception on his part of the law or facts. *Shaw et al. v. Nickerson*; *Gillespie et al. v. Nickerson*, vii. U. C. R. 541.

JUDGE (OF THE COUNTY COURT).

See ARREST, II. 5.—ATTACHMENT, I. 2.—MANDAMUS, 23, 24.

JUDGE (OF THE SURROGATE COURT).

See ARREST, II. 7.

JUDGMENT.

See AMENDMENT, III. 10, et seq.—ARBITRATION AND AWARD, VII. 1; VIII. 4.—ARREST, II. 10.—ARREST OF JUDGMENT.—ATTORNEY, III. 10.—CERTIORARI, 1.—COGNOVIT, 11.—COSTS, IV(2).—COVENANT, II(2), 15.—DISTRICT COURT, 15.—EJECTMENT, II. 5; V. 3, 5, 9, 10.—ELEGIT, 1.—EXECUTION, 7.—EXECUTOR ETC., III. 10.—FOREIGN JUDGMENT.—INTERLOCUTORY JUDGMENT.—INTEREST, 1.—JUDGE (IN CHAMBERS), 1. MONEY HAD AND RECEIVED, 3.—NEW TRIAL, II. 22.—NONSUIT, 21. SATISFACTION.—SCIRE FACIAS, 2. SET-OFF, 3, 9.

In bar.—1. A judgment recovered for a defect in pleading, and not on the merits, is no bar to another action. *Baker v. Booth*, ii. O. S. 373.

[See also, ATTORNEY, III. 10.]

On cognovit, when witness out of the province.—2. A witness to a cognovit having left the province, leave was given to enter up judgment. *King v. Robins*, Tay. U. C. R. 409.

3. Where a cognovit was given by one practising attorney, and witnessed by another, who was absent from the province, leave was given to enter judgment upon proof of the hand-writing of the defendant and the witness. *Cleal v. Latham*, i. U. C. R. 412.

Without common bail, irregular.—4. A judgment entered on a cognovit without filing common bail, is irregular, and will be set aside with costs. *Goslin v. Tune*, i. U. C. R. 277.

Against one defendant, the other being dead.—5. The Court will give leave to enter judgment against one defendant, the other being dead. *Nichall v. Cartwright et al.*, Tay: U. C. R. 639.

Refused on old cognovit, a discharge having been given.—6. The Court refused to allow judgment to be entered on a cognovit more than fifteen years old, when, although it was sworn that a larger debt was due, yet it appeared that the plaintiff had once accepted from the defendant an assignment of property, and given a discharge of the action, although the property proved unproductive. *Grant v. McIntosh (executors of)*, iv. O. S. 184.

Allowed on old cognovit, the plaintiff swearing that the defendant is still living.—7. The Court will order a judgment to be entered upon a cognovit seven years old, upon an affidavit from the plaintiff of the whole being due, and also stating that having received a letter from the defendant he believes him to be still alive, though the affidavit does not state that the

defendant wrote or signed the letter. *Oliphant v. McGinn*, iv. U. C. R. 170.

Several defendants—Cognovit signed by some—Judgment.—8. Where there are several defendants, and a cognovit intituled in the cause against all is executed by some only, judgment cannot be entered against these latter only. *Roach v. Potash et al.*, Trin. Term, 2 & 3 Vic.

Memorandum deferring payment—Judgment for whole amount.—9. Where a cognovit was given with a stay of execution to a future day, and a memorandum was indorsed deferring payment of part of the debt for a longer time, and at the day judgment was entered for the whole amount—the Court restrained the levy, according to the memorandum, with costs. *Fisher et al. v. Edgar*, Easter Term. 6 Wm. IV., and *Alexander v. Hervey*, Trin. Term, 7 Wm. IV.

Judgment entered in outer district, no proceedings having been had there—Transmission of papers to principal office.—10. A judgment entered upon a cognovit, by a deputy clerk of the Crown in an outer district, no previous writ or proceedings having been issued or taken out in such deputy's office, is in itself void. *Semble*, however, that if the judgment had been transmitted to the principal office in Toronto, and an entry had been made there, so as to constitute an entry of judgment on the face of the judgment roll, or so as in the terms of the statute 8 Vic. ch. 36, sec. 4, to enter judgment of record and docket it in the principal office, it might have been upheld. *Lavery v. Patterson*, v. U. C. R. 641.

11. Where a judgment had been entered on a cognovit, and a fi. fa. issued thereon in the office of the deputy clerk of the Crown, in an outer district, without the suit having been previously commenced in that office, by issuing process or otherwise—the Court, upon application, set aside the

judgment and all proceedings thereon. *Commercial Bank et al. v. Brondgeest et al.*, v. U. C. R. 325.

12. *Semble*: That the assignees of a bankrupt defendant sufficiently represent the interests of the bankrupt estate, to move the above exception to a judgment. *Ib.*

Cognovit by executor and executrix, personally binding under misapprehension—Judgment.—13. A. and B., executor and executrix, having given a cognovit signed by them as executor and executrix, and which the plaintiff's attorney led them to believe would bind them only in their representative character: *Held*, that though the cognovit might bind them personally in its terms, that a personal judgment entered up against them must be set aside. *Semble also*, that the judgment roll, alleging "a debt due by the testator in his life-time on an account stated, in consideration of which the defendants promised to pay," would not warrant a judgment against the defendants personally, but only against them as executor and executrix. *Gorie v. Beard et al.*, v. U. C. R. 626.

Lien on lands.—14. Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them. *Doe dem. McIntosh v. McDonell*, Trin. Term, 5 & 6 Wm. IV., and *Doe dem. Auldjo v. Hollister*, Easter Term, 2 Vic. [But see case 26, *infra*.]

15. The judgment of a district court cannot bind lands for want of a docket. *Doe dem. McIntosh v. McDonell*, iv. O. S. 195.

Judgment against casual ejector—Time to enter.—16. Judgment cannot be entered against the casual ejector until four days have elapsed from the time the rule for judgment is taken out of the office. *Doe dem. Harley v. Roe*, ii. O. S. 113.

[See statute 14 & 15 Vic. ch. 114, secs. 1 and 5. Setting aside such judgment for collusion—See EJECTMENT, V. 3, 5, 9, 10, 11, page 180.]

17. In an ejectment for premises in the Home district, when the tenant is called upon to appear within the first four days of the term, it is irregular to sign judgment against the casual ejector until the afternoon of the fifth day after the rule to appear has been taken out of the office. *Doe dem. Robinson v. Roe*, Easter Term, 3 Vic.

[Waiver of irregularity in a judgment against the casual ejector—See WAIVER, 4.]

Judgment of inferior courts, evidence in superior courts.—18. A judgment in an inferior court for a specific sum, is *prima facie* evidence in a superior court against a less sum only being due, and as respects the merits of the judgment, it is conclusive evidence, till it is repelled by proof of such facts as have been admitted, to destroy the effect of foreign judgment as evidence of a debt. *Page v. Phelan*, i. U. C. R. 254.

Bar to an action on a district court judgment.—19. In debt on a judgment of a district court it is a good plea in bar that the plaintiff arrested the defendant on a writ of *capias ad satisfaciendum*, and afterwards consented to his discharge. *Fraser v. Bacon*, ii. U. C. R. 132.

Nunc pro tunc—Interest.—20. Where a cause had been pending for several terms on a motion for a new trial after a verdict for the plaintiff, the Court refused, after discharging the rule for the new trial, to allow the plaintiff to enter judgment as of the term in which the motion was made, in order that he might obtain interest on his verdict while the proceedings had been stayed by the motion for a new trial. *Powell v. Boulton*, iii. U. C. R. 53.

Verdict subject to a reference—No award by neglect of defendant—Judgment.—21. Where a verdict is taken for the plaintiff subject to a reference, and no award has been made, owing chiefly to the neglect of the defendant, the Court will allow judgment

to be entered for the amount of the verdict, unless the defendant submit to another reference on reasonable terms. *Watson v. Fothergill*, Easter Term, 6 Wm. IV.

Leave of court before entering judgment on such verdict.]—22. A plaintiff who takes a verdict subject to a reference, but does not proceed to arbitration, owing partly to the fault of the arbitrators, partly to the delay of the defendant, cannot enter judgment on the verdict without first applying to the Court. *Mott v. Loucks*, Trin. Term, 1 & 2 Vic.

Grounds for entry.]—23. The Court will not allow judgment to be entered on a verdict subject to a reference on account of the attempt to arbitrate having failed. *Gould v. Freeman*, iii. U. C. R. 270.

Time for entry of such judgment.]—24. Where an award upon a reference at Nisi Prius (a verdict being taken subject to such award,) can be said to rest on a verdict only, there being no other matters in difference left to the arbitrators but those in the cause, judgment may be entered after the first four days of the succeeding term. But when the reference can be said to include matters in difference between the parties not included in the cause, judgment cannot be entered until after the next succeeding term. In other words, in the first case the party against whom the award has been rendered has the first four days of the term within which to move to set the award aside; and in the second case, he has the whole of the term. *Hawke v. Duggan*, v. U. C. R. 636.

25. Where a cause was referred to arbitration on a verdict taken by consent, and the award being made in vacation final judgment was entered before the first day of the next term, the judgment was held to be irregular. *Vincent v. McLean*, Dra. Rep. 177.

Purchase of land subject to a judgment.]—26. Where a party purchases land upon which a judgment had attached, he holds the land subject to a right of sale under a fi. fa. by the judgment creditor. *Doe dem. McPherson v. Hunter*, iv. U. C. R. 449.

Verdict subject to points reserved—Entry of judgment without argument of those points—Delay in moving against it.]—27. Where a verdict was rendered for the plaintiff in ejectment subject to points reserved, and without any argument of the points the plaintiff entered and took possession of the land in dispute, the Court refused to interpose and set the judgment aside after a lapse of more than two years. *Doe dem. Myers v. Tolman*, i. U. C. R. 520.

Entry of judgment, when points reserved but not mentioned in the judge's notes.]—28. Where points are reserved at a trial and indorsed on the record, but the judge makes no entry thereof in his notes, the record must govern, and judgment cannot be entered until the points are disposed of. *Taylor v. Taylor*, Hil. Term, 7 Wm. IV.

JUDGMENT (ARREST OF).

See ARREST OF JUDGMENT.

JUDGMENT AS IN CASE OF NON-SUIT.

- I. WHEN RULE FOR JUDGMENT GRANTED OR REFUSED.
- II. GROUNDS FOR DISCHARGING THE RULE ON THE PEREMPTORY UNDERTAKING.
- III. PRACTICE ON MOVING OR OPPOSING THE RULE.
- IV. PROCEEDINGS AFTER BREACH OF UNDERTAKING AND CONDITIONS.

I. WHEN RULE FOR JUDGMENT GRANTED OR REFUSED.

When venue laid in the country.—

1. Where the venue is laid in the country, a rule for judgment as in case of a non-suit will be granted, when two assizes have passed without the plaintiff proceeding to trial. *Start v. Bullen*, Easter Term, 2 Vic.

Case put to foot of docket with consent of parties, and not afterwards tried.—2. Where a cause came on to be tried in its turn, and the plaintiff not being ready the defendant consented that it should be put to the foot of the docket, and it could not afterwards be tried for want of time—a rule for judgment as in case of a non-suit was refused. *Bank of Upper Canada v. Covert et al.*, Mich. Term, 6 Wm. IV., and *Bank of Upper Canada v. Bethune et al.*, Mich. Term, 6 Wm. IV.

After a trial.—3. The rule for judgment as in case of a non-suit cannot be obtained where there has been a trial, and if obtained, and the plaintiff entered into a peremptory undertaking, he is not bound by it. *Warren v. Smith*, Hil. Term, 2 Vic.

When jury discharged without a verdict.—4. Where a cause was brought down to trial and the jury discharged without giving any verdict, and the plaintiff did not afterwards proceed: *Held*, that the defendant could not move for judgment as in case of a non-suit, because the plaintiff had not proceeded to trial according to the practice of the Court, within two assizes after issue joined. *Bradbury v. Flint*, Mich. Term, 4 Vic.

Not allowed in replevin.—5. A defendant in an action of replevin cannot move for judgment as in case of a non-suit. *Brown v. Simmons*, i. U. C. R. 336:

Entry of incipitur on the roll sufficient.—6. The entry of the incipitur upon the roll is a sufficient entry to

enable the defendant to move for judgment as in case of a non-suit. *Brown v. Stuart*, Tay. U. C. R. 183.

Not allowable till issue joined.—7. Judgment as in case of a non-suit cannot be moved before issue joined and the issue entered on the record. *Wilson v. Westbrooke*, Easter Term, 4 Vic., P. C., McLean, J., and *McLellan et al. v. Smith*, Trin. Term, 4 & 5 Vic., Macaulay, J.

[See *Brook v. Lloyd*, i. M. & W. 552, and *Jackson v. Utting*, x. M. & W. 640.]

8. Even if notice of trial had been given and countermanded, yet if the similiter be not added, the rule will be refused. *Gibson v. Washington*, Easter Term, 7 Vic., i. U. C. R. 410, P. C., Hagerman, J.

[See next case, also, div. III. 3, infra.]

9. *Semble*: That when a plaintiff has given notice of trial, a rule for judgment as in case of a non-suit will be made absolute, even although the cause be not at issue, no similiter having been entered, unless that fact be shewn in answer to the rule. *Elvidge v. Boynton*, Mich. Term, 7 Vic., i. U. C. R. 279, P. C., Jones, J.

[See also, div. III. 2 infra.]

10. A cause is not at issue, and the rule for judgment will not be granted, if the similiter be not actually filed. *Doe dem. Anderson v. Todd et al.*, Mich. Term, 7 Vic., i. U. C. R. 279, P. C., Jones, J.

11. Nor can the rule be obtained in a cause in which there are several pleas on which no issue has been joined, by adding similiter. *McCague v. Clothier*, Easter Term, 8 Vic., i. U. C. R. 517, P. C. Hagerman, J.

Cause made a remanet.—12. Where a cause has once been taken down to trial and made a remanet of, the defendant cannot afterwards obtain judgment as in case of a non-suit, in a country cause. *Doe dem. Dodge v. Rose*, iv. U. C. R. 174.

When judge refuses to try the cause the issue being immaterial.—13.

The refusal of a judge to try a cause upon an immaterial issue places the record in the same situation as if the cause had been made a remanet—the defendant therefore cannot have judgment as in case of a non-suit, under such circumstances. *Hodgson v. Stevens*, v. U. C. R. 625, P. C., McLean, J.

Granted, unless costs of the day be paid.]—14. The Court will sometimes order that a rule for judgment as in case of a non-suit shall be made absolute, unless the costs of the day be paid within a certain time. *Warren v. Grant et al.*, Easter Term, 2 Vic.

To one of several defendants.]—15. One of two defendants cannot have judgment as in case of a non-suit. *Spafford v. Buchanan et al.*, Mich. Term, 6 Wm. IV.

To one defendant, when judgment by default against co-defendant.]—16. Where there are two defendants and one pleads to issue, and the other allows judgment to go by default, and the plaintiff does not proceed to trial pursuant to notice, the application for judgment as in case of a non-suit cannot be made by both defendants, but only by the one who had pleaded. *Brunskill v. Chumasero et al.*, v. U. C. R. 270.

17. *Semble*: That even in a joint action of assumpsit, one of several defendants jointly sued may move for judgment as in case of a non-suit. *Ib.*

[So *Stuart v. Rogers*, iv. M. & W. 649, *Jones v. Gibson*, 5 B. & C. 768. And so in actions of tort, *Hadrick v. Heslop*, 11 Jur. 1012.]

Changing venue—Subsequent default in going to trial.]—18. A venue is not changed by a judge's order and service alone, and a defendant will not be entitled to judgment as in case of a non-suit upon the ground that the plaintiff did not go to trial in pursuance of a notice grounded upon such order. *M'Nair v. Sheldon*, Tay. U. C. R. 598.

II. GROUNDS FOR DISCHARGING THE RULE ON THE PEREMPTORY UNDERTAKING.

Plaintiff prevented by defendant from entering record in proper time.]

—1. A rule for judgment as in case of a non-suit was discharged on the peremptory undertaking without costs, when owing to delay occasioned by an application of the defendant, the plaintiff had been prevented from entering his record for trial on the commission day of the assizes, and the defendant refused to its being afterwards entered until the plaintiff's witnesses had gone home, and he knew that the plaintiff could not proceed to trial. *Penniman v. Wince*, Mich. Term, 6 Wm. IV.

[See also, case 4, *infra*.]

Issues in law undisposed of.]—2. It is no sufficient ground of opposition to a rule nisi for judgment as in case of a non-suit, that there are issues in law undisposed of. *Leach v. Dulmage*, Easter Term, 3 Vic.

[*Sed quare*, overruling, 2 Marsh, 364.]

Injunction from Chancery to stay execution.]—3. A rule for judgment as in case of a non-suit, for not proceeding to trial pursuant to notice, was discharged unconditionally, when it appeared that after notice of trial was given, but within the time for countermanding, an injunction was granted in Chancery to stay execution in the cause. *Doe dem. Burnside v. Hector*, Trin. Term, 4 & 5 Vic., P. C., Macaulay, J.

Plaintiff prevented from proceeding by defendant.]—4. *Semble*: That where a plaintiff has been prevented by the defendant from proceeding to trial, a rule for judgment as in case of a non-suit will be discharged on the peremptory undertaking without costs. *Doe dem. Anderson v. Todd et al.*, i. U. C. R. 279.

Record withdrawn by advice of counsel.]—5. It is sufficient to entitle the plaintiff to enter into a peremptory

undertaking after default in not proceeding to trial, that it appears on affidavit that on some special circumstances he withdrew the record, acting bona fide on counsel's opinion, without any statement of the circumstances. *Armstrong v. Benjamin*, i. U. C. R. 414.

Defendant having tampered with plaintiff's witness.]—6. Where a witness attending the assizes on the part of the plaintiff is seen to converse with the defendant and afterwards shews an unwillingness to remain, and leaves the assizes, this fact will entitle the plaintiff to enter into the peremptory undertaking, upon judgment as in case of a nonsuit being moved by the defendant. *Bates v. O'Donohoe*, iii. U. C. R. 178.

Absence of material witness, and plaintiff having made satisfactory offers to defendant before motion.]—7. Where a plaintiff does not proceed to trial pursuant to notice, from the absence of a material witness, and before the term requests the defendant's attorney not to put him to the expense of moving for judgment as in case of a nonsuit, offering to enter into a peremptory undertaking, to pay the costs for not proceeding to trial, and to satisfy the defendant that he would be able to discharge a rule for a nonsuit: *Held*, rule discharged on peremptory undertaking, the plaintiff paying no costs, except those of not proceeding to trial. *Doe dem. De Reimer v. Glass*, iv. U. C. R. 255.

Defendant having deceived plaintiff in procuring certain evidence.]—8. A rule for judgment as in case of a nonsuit was discharged without costs, the plaintiff having been led by the defendant to rely upon him for the procurement of some evidence in the cause, and which the defendant subsequently, and after the record had been entered, determined not to send. *Doe dem. Rees v. Dick*, vi. U. C. R. 621, P. C. Draper, J.

III. PRACTICE ON MOVING OR OPPOSING THE RULE.

Time to make motion.]—1. When issue was not joined till about the middle of August, and the plaintiff not having given notice of trial for the October assizes following, the defendant moved in the November term for judgment as in case of a nonsuit: *Held*, that the application was made too soon after issue had been joined. *Cuvillier et al., v. Privat*, v. U. C. R. 643.

When judgment may be obtained without affidavit of issue being joined.]—2. Where a plaintiff has given notice of trial and countermand, and afterwards not proceeded to trial according to the practice of the Court, the defendant may obtain a rule for judgment as in case of a nonsuit, without stating in his affidavit that issue is joined. *Clute v. Badgely*, Hil. Term, 7 Vic. i. U. C. R. 417, P. C. McLean, J.

Affidavit must shew issue to be joined.]—3. In an application for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice, the affidavit on which such motion is made must shew that issue has been joined, or the record must be produced, to shew that the similitur has been added by the proper officer of the Court. *Price v. Brown*, Easter Term, 9 Vic., iii. U. C. R. 127, P. C. Hagerman, J.

Notice of motion in lieu of rule nisi.]—4. A notice of intended motion for judgment as in case of a nonsuit will not supply the place of a rule nisi. *Smith v. Kennett*, Tay. U. C. R. 638.

Motion to discharge rule.]—5. The motion to discharge a rule for judgment as in case of a nonsuit on the peremptory undertaking must be made in open Court, and be supported by affidavit. *Hollister v. Barnhart*, Hil. Term, 2 Vic.

Defendant allowed to answer affidavits filed in opposition to rule.]—

6. Where a plaintiff shewed cause against a rule for judgment as in case of a nonsuit, and filed affidavits entitling him to enter into the peremptory undertaking, and also urged relief from the costs of the day, the defendant was allowed to file affidavits in answer, the Court ruling that he was to be considered in the same position as if the costs had been demanded on a separate motion. *Burr v. Bernard*, Trin. Term, 3 & 4 Vic.; P. C. Macaulay, J.

7. Where in answer to a rule for judgment as in case of a nonsuit the plaintiff filed affidavits alleging an agreement with the defendant to refer the cause to arbitration, which was the cause of his not proceeding to trial, time was given the defendant to answer those affidavits. *Skae v. Ackland*, Hil. Term, 4 Vic.

Re-opening of rule nisi for argument.]—8. Where a rule nisi for judgment as in case of a nonsuit was enlarged until the first day of the next term, and on the second day of the term the rule was made absolute, no cause being shewn against it, the Court, though they held the defendant regular in moving his rule absolute when he did, allowed the plaintiff nevertheless, upon affidavits filed during the term, to have the rule nisi re-opened for argument. *Stewart v. Davis*, v. U. C. R. 268.

Rule containing peremptory undertaking, when, and by whom, to be taken out.]—9. The rule containing the peremptory undertaking of the plaintiff to go to trial may be taken out by the defendant after term, though moved for by the plaintiff in term. This rule may also be taken out after the time therein limited for the plaintiff's taking the cause down to trial. *Ross qui tam v. Meyers*, vi. U. C. R. 622.

IV. PROCEEDINGS AFTER BREACH OF UNDERTAKING AND CONDITIONS.

Rule absolute in first instance.]—1. The rule for judgment as in case

of a nonsuit, after a peremptory undertaking and default, is absolute in the first instance. *Benhan v. Shaw*, Dra. Rep. 121, and *Mastin v. Garrow*, Mich. Term, 2 Vic.

[So 4 Bing. N. C. 365.]

Relief from rule absolute rarely granted—Service of rule not necessary.]—2. Where a rule for judgment as in case of a nonsuit has been discharged by the plaintiff on a peremptory undertaking and payment of costs, and he afterwards makes default, both in proceeding to trial and payment of those costs, the Court will not, unless under very special circumstances, set aside a rule absolute which has been obtained by the defendant in consequence. It is not necessary that a rule absolute for judgment as in case of a nonsuit shall be served. *Matthewson v. Glass*, i. U. C. R. 516.

Payment of costs of the day and rule made a condition precedent.]—3. Payment of the costs of the day, and of the application for judgment as in case of a nonsuit, may be made a condition precedent to the plaintiff's being allowed to discharge the rule for judgment, and to carry down the cause for trial at the next assizes. If no costs of the day have been incurred, that portion of the rule may be considered as surplusage; the rule need not be amended. *Ross qui tam v. Meyers*, vi. U. C. R. 622.

When rule discharged with costs, no proceedings can be had till those costs be paid.]—4. If a rule nisi for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice is discharged upon a peremptory undertaking, payment of the costs of the day &c., the plaintiff can take no further steps towards proceeding to any future trial unless those costs be first paid; and if he do proceed, as by giving notice of trial, the defendant may treat such notice as a nullity. *Doe dem. McMillan v. Brock*, i. U. C. R. 482.

Proceedings taken without payment of costs set aside.]—5. Where a cause has been taken down to trial and withdrawn, and in the ensuing term a rule for judgment as in case of a nonsuit is discharged upon the peremptory undertaking and payment of costs, and the plaintiff afterwards obtains a judge's order to amend his declaration on payment of costs, and without paying the costs in both cases serves the defendant with his amended declaration, the Court set aside the filing of the amended declaration with costs. *Maddock v. Corbet*, iv. U. C. R. 257.

Discharge of rule for judgment, on peremptory undertaking—Plaintiff treating his own rule as a nullity—Condition as to costs.]—6. Where the plaintiff had given notice of countermand, and the defendant obtained a rule nisi for judgment as in case of a non-suit, and the plaintiff discharged the rule on the peremptory undertaking, with the condition inserted, on paying not only the costs of the application but the costs of the day, and the plaintiff without paying any costs, treating his own rule as a nullity, proceeded to trial—the Court set aside the verdict without costs, on the ground that though the plaintiff could not be compelled, where he had countermanded his notice of trial, to pay the costs of the day, and that the rule so far was insensible, yet that the conditions as to the costs of the application being good, the whole rule granted on the plaintiff's own motion could not be disregarded by him afterwards as a nullity. *Ross qui tam v. Meyers*, vii. U. C. R. 374.

JUDGMENT NON OBSTANTE VEREDICTO.

Time for motion.]—1. *Semble*: That applications for judgment non obstante or to arrest judgment, are not limited with us, as in England, to the first four days of the term next after

the assizes. *Perry v. Richmond*, v. U. C. R. 285.

[But see rule of Hilary Term, 13 Vic., No. 38, in which it is ordered that this motion must be made within the time allowed for new trials, viz., within the first four days of the term after trial.]

Trespass quare clausum fregit against sheriff—Averments of outer door being broken or open, omitted.]

—2. Neither the declaration nor replication in an action of trespass quare clausum fregit against a sheriff charged as an injury “the breaking of the outer door,” and the plea justifying the trespass under a writ of fi. fa., on grounds sustained at the trial, contained no allegation that “the outer door was open,” the plaintiff cannot, because the plea does not contain such allegation, move for judgment non obstante veredicto. *Evans v. Kingsmill*, iii. U. C. R. 118.

[There must be an express confession of the cause of action, to entitle a person to judgment non obstante.—*Atkinson v. Davies*, xi. M. & W. 236; *Pine v. Grazebrook*, 2 C. B. 429.]

JUDGMENT NUNC PRO TUNC.

See JUDGMENT, 20.

JUDGMENT OF NON PROS.

See CAPIAS AD SATISFACIENDUM, 8.—CORPORATION, 2.—JUDGE (IN CHAMBERS), 2.—PARTICULARS OF DEMAND, 4.—TERM'S NOTICE, 3.

Several defendants—Order for particulars to one, the others not having appeared.]—1. Where in an action of assumpsit against several defendants, one of the defendants had obtained an order for particulars, which, after a lapse of several months had not been delivered, the Court discharged a rule nisi, which he obtained for the delivery of particulars by a certain day, or that he should be at liberty to sign judgment of non pros., on the plaintiff shewing that all the defendants had not

appeared. *Shore et ux. v. Bradley et al.*, Trin. Term, 4 & 5 Vic., P. C., Macaulay, J.

Judgment for want of a similiter.]—2. Judgment of non pros. cannot be signed, because the plaintiff has not served a similiter (see 19th rule Easter Term, 5 Vic.,) upon issue joined—the Court, in passing the record, will add the similiter as of course. *Young v. Stockdale*, v. U. C. R. 332.

Judgment for mistake in declaration.]—3. A defendant cannot sign judgment of non pros. for not declaring, where the plaintiffs have in fact declared but a mistake has been made in the name of one of them, the proper course being to move to amend the declaration as to the name, under 7 Wm. IV. ch. 3, or to set it aside for irregularity. *Hart et al. v. Boyle*, Mich. Term, 5 Vic.

Signing judgment without filing original papers.]—4. It is irregular to sign a judgment of non pros., without filing the original papers in the judgment office. *Lyman v. Cotter* and *Lyman v. Lovejoy et al.*, iv. O. S. 15.

JURISDICTION.

See ARBITRATION AND AWARD, II.

5.—ATTORNEY, III. 17, 18.—BAIL, II. 15; III. 10.—DISTRICT COURT, 1, 5, 6, 7, 9, 12, 13.—FOREIGN JUDGMENT, 10, 13.—FOREIGN LAW, 4.—LIBEL AND SLANDER, I. 6, 7.—REVENUE.—SHERIFF'S SALE, 7.—SUBPENA, 2.

JURY.

See ASSESSMENT OF DAMAGES, 4.—COSTS, II. 12.—NEW TRIAL, VII.; X. 13.—NON-SUIT, 14.—SHERIFF, III. 15.

Notice of striking special jury.]—1. There must be four clear days' notice of striking a special jury; therefore a

notice given after 11 a. m., on Saturday, to strike a special jury at 11 a. m., on Tuesday, is not sufficient. *Bell v. Flintfoot*, iii. U. C. R. 122.

[So the statute 13 & 14 Vic. ch. 55, sec. 41, enacts that the notice must be served at least four days before striking a special jury.]

Time for striking special jury—Number.]—2. A special jury cannot be struck after the commission day of the assizes; but it is no objection to such a jury that the sheriff has not summoned sixteen jurors, if a sufficient number attend to try the cause. *Mowry v. Maynard*, Mich. Term, 6 Wm. IV.

3. *Quære*: Should not a venire and distringas issue in such a case? *Ib.*

Special jury improperly struck—Waiver.]—4. Where a special jury was improperly struck, but the defendant's attorney was present and made no objection: *Held*, that he could not afterwards, on that ground, move for a new trial. *Shipman v. Birmingham*, Hil. Term, 7 Wm. IV.

Certificate.]—5. An application for a judge's certificate, that a cause is a proper cause for a special jury, must be made immediately after the trial, on the same day as the cause is tried. *Binkley v. Dejardine*, Tay. U. C. R. 231.

Cause tried by common jury, when special jury struck but not summoned.]—6. Where on a venire to a coroner a special jury was struck, but the coroner neglected to summon them, and the cause was tried by a common jury, the defendant objecting, but afterwards entering into his defence, the plaintiff obtained a verdict: *Held*, that the verdict was irregular, and that the defence, made under protest, did not operate as a waiver. *McMartin v. Powell*, Easter Term, 3 Vic.

Cause irregularly tried by common jury—New trial—Second trial by common jury.]—7. If a special jury be struck previous to an assize, and the cause is irregularly tried at

that assize by a common jury, and the verdict afterwards set aside, it is irregular to try the cause a second time by a common jury, no new special jury being struck. *McMartin v. Powell et al.*, Trin. Term, 3 & 4 Vic.

Relief under 7 Wm. IV. ch. 10.]
—8. By a liberal construction of the Estreat Act, 7 Wm. IV. ch. 10, the Court will, in certain cases, relieve jurors from fines imposed on them at Nisi Prius, after the fine has been levied by the sheriff. *Cole, In re*, Trin. Term, 5 & 6 Vic.

Affidavits by jurors to shew mistake in verdict.]—9. The affidavits of jurymen cannot be received to shew that there was a mistake in their verdict, unless the mistake also appear in the judge's notes. *Malloch v. Morris*, Trin. Term, 1 & 2 Vic.

[Affidavits of jurors as to what took place in open court on the delivery of their verdict, are receivable—*Roberts v. Hughes*, vii. M. & W. 399; or to answer a charge of personal misconduct—*Stoudewick v. Hopkins*, 2 Dowl. Q. B. 502.]

Coroner—Panel to be returned by coroner under special writ of venire.]
—10. The coroner, under a special writ of venire, is not required to return a panel of thirty-six jurors, the 36 Geo. III. ch. 2, and the general jury law being applicable only to the sheriff, and not to the coroner. *Fraser v. Dickson*, v. U. C. R. 231.

[See the Jury Laws consolidated and amended by 13 & 14 Vic. ch. 55.]

JURY PROCESS.

See JURY, 3, 10.

In ordinary cases in this Court, there is no necessity for the plaintiff to issue writs of venire facias and habere corpora juratorum. *Boulton v. Fitzgerald et al.*, i. U. C. R. 476.

JUSTICES OF THE PEACE.

See MAGISTRATES.

JUSTIFICATION.

See ASSAULT AND BATTERY, passim. ATTORNEY, II(2), 4.—DE INJURIA, 3.—DISTRESS, I. 11, 13.—EASEMENT, 4, 6.—FALSE IMPRISONMENT, passim.—GAOLER, 2, 3.—INDEMNITY ACT, 2.—LIBEL AND SLANDER, II. 7.—MALICIOUS PROSECUTION, 4.—PLEADING, I. 12; II. 4, 11, 13.—SHERIFF, I. 19; III. passim.—TRESPASS, II. passim.—TROVER, II. 3.—VARIANCE, 5.—VENDITIONI EXPONAS, 4, 6.

JUSTIFICATION (AFFIDAVIT OF).

See ABSCONDING DEBTOR, 19.—BAIL, I. 1, 2, 3.

KING'S COLLEGE.

See LIMITATIONS (STATUTE OF), III. 10.

Recovery for tuition given before 1837.]—1. The King's College cannot recover for tuition given in "Upper Canada College" before the passing of the statute of 7 Wm. IV. ch. 16, (1837). *King's College v. Denison*, v. U. C. R. 203.

Objections to recovery after 1837.]
—2. It is no objection to the right of King's College to sue for tuition given after the passing of the act 7 Wm. IV. ch. 16, in "Upper Canada College," that professors to "King's College" had not during the time sued for been appointed. *Ib.*

KINGSTON BANK COMMISSIONERS.

See ARBITRATION AND AWARD, VI (2), 7.

KINGSTON MARINE RAILWAY COMPANY.

May give and receive promissory notes.]—1. Under the statutes 1 Vic.

ch. 30, and 7 Vic. ch. 16, the Kingston Marine Railway Company may give and receive promissory notes in the course of transacting their legitimate business. *Kingston Marine Railway Company v. Gunn*, iii. U. C. R. 368.

Action—Averment of consideration.—2. In declaring upon such notes, the plaintiffs need not aver the consideration upon which they were received. *Ib.*

Evidence to prove notes illegal.—3. The omission of the words "value received" in a note, or the fact that a note is made payable at a certain time after date, affords no inference that such notes were taken in violation of that clause of the act of incorporation prohibiting the company from banking operations. *Ib.*

KINGSTON (TOWNSHIP OF).

Lot 24, Con. 1—Side lines.—The eastern side line of Lot 24 in the front or first concession of the township of Kingston, cannot be run as it is described in the grant from the Crown, or parallel to the western limit of the township, according to 59 Geo. III. ch. 14, because that would carry the concession beyond the line which was originally run as its eastern boundary. *Doe dem. Stuart v. Forsyth*, i. U. C. R. 324.

LABORERS.

A person hiring himself to work with his own team of oxen, is not an object of the British statutes for punishing laborers deserting their service. *Whe- lan v. Stevens*, Tay. U. C. R. 607.

LACHES.

See BAIL, I. 10.—BILLS OF EX-CHANGE ETC., II. 13.

LANDLORD AND TENANT.

See ARREST OF JUDGMENT, 1.—BOND II. 15.—COVENANT, II(2), *passim*. DE INJURIA, 4.—DISTRESS.—EJECTMENT, VIII. 12, 18.—FORFEITURE, 1, 2, 3.—PLEADING, II. 15; VIII. 6.—REPLEVIN ETC., *passim*.—SURRENDER, 5.

I. RELATION AND RIGHTS OF LANDLORD AND TENANT.

II. DESCRIPTION OF TENANCY, AND OVERHOLDING TENANCY IN PARTICULAR.

III. DEMAND OF POSSESSION, AND NOTICE TO QUIT.

I. RELATION AND RIGHTS OF LANDLORD AND TENANT.

See ARREST OF JUDGMENT, 1.—EJECTMENT, I. 2, 8, 9, 10, 11, 27.—FORFEITURE.—HIGHWAY, 7, 8, 9.—MONEY HAD AND RECEIVED, 4.—REPLEVIN, 5, 8, 9.—TRESPASS, I. 8.

Construction of agreement to deliver half the wheat produced.—1. A. leased a farm to B. upon the condition that B. was to deliver to him one-half of the wheat to be raised on the farm.—B. was to harvest it and thrash it, and deliver it to the defendant's granary: *Held*, that under this agreement, A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that therefore no legal property in the wheat could vest in A. till B., the tenant, had thrashed it and delivered to him his portion. *Haydon v. Crawford*, iii. O. S. 583.

[See MONEY HAD AND RECEIVED, 4.]

Farm on shares—Notice to quit.

—2. A person taking a farm on shares for a specific term is a lessee, and entitled to six months' notice to quit. *Doe dem. Bunnill v. Link*, Easter Term, 7 Wm. IV.

Right of landlord to maintain trespass against tenant.—3. A

landlord may maintain an action of trespass against his tenant to recover the value of trees cut down and carried away by him, and which were not demised to him, though growing on the land which the tenant held. *Chesnut v. Day et al.*, Hil. Term, 7 Vic.

Right of landlord to maintain trespass against a stranger.—4. When premises have been let, and the tenant is in possession of them, the landlord has no right of action against a person for breaking and entering the said premises and pulling down the fences, unless that person has at some other time removed the rails and converted them to his own use. *Bleeker v. Colman*, iii. U. C. R. 172.

Wrongful encroachment by tenant for twenty years—Rights of landlord thereby.—5. Where a landlord places a tenant in possession of lot number one, and the tenant knowingly encroaches on lot number two, to which the agreement between himself and the landlord gives him no title whatever: *Held*, that the tenant's occupation does not enure to create for the landlord a title to lot number two by means of a twenty years' possession of the lot. *Doe dem. Smyth v. Leavens*, iii. U. C. R. 411.

Right of tenant to put another into possession.—6. A tenant cannot be allowed to put another into possession, or connive at his slipping into possession, but must deliver up the premises to his own landlord. This principle is laid down in many cases, and it is very necessary to insist on it for the protection of landlords. Per Robinson, C. J. *Doe dem. Miller v. Tiffany*, v. U. C. R. 79.

Purchase by tenant over landlord's head.—7. A party in possession as a tenant at will, will not be allowed to purchase from a stranger over his landlord's head. *Doe dem. Simpson et al. v. Molloy et al.*, v. U.C.R. 320.

Trespass—Plea, liberum tenementum—Replication, tenancy at will.]

—8. Where in trespass quare clausum fregit the defendant pleaded liberum tenementum, and the plaintiff replied that the defendant had leased the premises to the plaintiff *at will*, and that under the demise he entered and was possessed until the defendant broke and entered, &c., the replication was held bad on general demurrer. *Henderson v. Harper*, i. U. C. R. 481.

As to landlord prejudicing his claim for rent.—9. The circumstance of a landlord having joined in giving a bond that the goods distrained should be forthcoming for the purpose of being sold upon fi. fa., will not prejudice his claim for rent, neither will his claim be prejudiced by his having distrained as landlord, and by afterwards having abandoned the distress, nor even by his bidding at the sale of the goods. *Brown v. Ruttan*, vii. U. C. R. 97.

II. DESCRIPTION OF TENANCY, AND OVERHOLDING TENANCY IN PARTICULAR.

See COSTS, VII. 6.—DISTRESS, I. 3, 6.—LEASE, I. 4.

Agreement for a lease not carried into effect—Situation of tenant.—1. Where a tenancy from year to year exists, and during its continuance the parties agree for a lease for a certain term, with a power to purchase, which is never executed, the tenant stands in his original situation, on the failure of the agreement, and cannot be ejected without a regular notice to quit. *Doe dem. Crookshank v. Crookshank*, Mich. Term, 5 Vic.

4 Wm. IV. ch. 1, s. 53, applies only to overholding tenants.]—2. The statute 4 Wm. IV. ch. 1, sec. 53, applies only to tenants overholding after their term has expired, and not to a tenancy at will. *Adnerant v. Shriver*, Trin. Term, 6 & 7 Wm. IV.

Right of landlord to take possession of premises overholden.—3. Where a

tenant holds over after the expiration of his term, his landlord has a right to take possession if he can, without a breach of the peace. *Boulton v. Murphy et al.*, Easter Term, 2 Vic.

Recovery against overholding tenant—Refusal to restore tenant.—4.

Where in a proceeding to dispossess an overholding tenant, under 4 Wm. IV. ch. 1, the jury found in favor of the landlord—the Court refused to set aside the writ of possession issued on that finding, and restore the tenant to possession, on the ground that the agent of the landlord had received a month's rent after the finding of the jury. *Wright v. Johnson*, ii. U. C. R. 273.

4 Wm. IV. ch. 1, applies only to tenants whose terms have expired.]—

5. The 53rd and other clauses of the statute 4 Wm. IV. ch. 1, giving a summary remedy against overholding tenants, apply only to tenants whose terms have expired by lapse of time, not to those who by alleged breach of covenant have forfeited their terms. *McNab v. Dunlop et al.*, *In re*, iii. U. C. R. 135.

Who is an overholding tenant.—

6. A tenant remaining in possession after the expiration of his term, and paying two months' rent, cannot, in the middle of the third month, be treated by his landlord as an overholding tenant, under 4 Wm. IV. ch. 1. *Adams v. Bains*, iv. U. C. R. 157.

7. *Quere*: Does the statute 4 Wm. ch. 1, sec. 53, apply in any case but to the plain one of a tenant overholding after the expiration of a term expressly created by contract between the parties? *Ib.*

III. DEMAND OF POSSESSION AND NOTICE TO QUIT.

See EJECTMENT, I.

LAND TAX.

See TAXES.

LARCENY.

See CONVICTION, 8.—CRIMINAL LAW, 2.—LIBEL AND SLANDER, III(1), 6. NOTICE OF ACTION, 8.

4 & 5 Vic. ch. 25—*Stealing fruit.*]

—A party cannot be prosecuted under our criminal statute 4 & 5 Vic. ch. 25, for stealing fruit "growing in a garden," unless the bough of the tree upon which the fruit is hanging be within the garden. *McDonald v. Cameron*, iv. U. C. R. 1.

LEASE.

- I. CONSTRUCTION AND OPERATION.
- II. OTHER MATTERS.

I. CONSTRUCTION AND OPERATION.

See COVENANT, I. 5, 10.—DISTRESS, I. 4.—EJECTMENT, VIII. 16.—FRAUDS (STATUTE OF), I. 6.

Word "demise," an implied covenant.—1. The word demise in a lease contains an implied covenant that the lessee shall peaceably enter and enjoy. *Smart v. Stuart*, Trin. Term, 6 & 7 Wm. IV.

Covenant to quit premises at the expiration of term.—2. When a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time: *Held*, that on ejectment brought by the lessor at the end of the term, the lessee could not set up a former lease to himself for a longer period. *Doe dem. Wimburn v. Kent*, Hil. Term, 7 Wm. IV.

Words "agrees to let or hire," those of a present demise.—3. The words "agrees to let or hire," are words of a present demise, where the contrary does not appear to be the intention in the instrument in which they are contained. *Cumming v. Hill*, Hil. Term, 5 Vic.

Lease not under seal.—4. A lease for life for a nominal rent, not under

seal, although it cannot pass a freehold interest, will operate as a lease from year to year, and the lessee cannot be dispossessed without six months' notice to quit. *Doe dem. Lawson v. Coutts*, Easter Term, 7 Wm. IV.

Covenant to pay rent, with condition that if tenant should make a breach in any of his covenants landlord might re-enter.—5. Where the lessee covenanted to pay the yearly rent, and there was a condition in the lease "that if the tenant should do or omit anything in breach or non-performance of any of his covenants," then it would be lawful for the landlord to re-enter: *Held*, that the effect of the non-payment of the rent upon such a demise would be to make it not void ipso facto, but only void upon proper proceedings being taken for that purpose; and consequently, that until such proceedings were taken, the term would subsist in the tenant, and the landlord could not maintain his title in ejectment: *Held also*, that it would be necessary for the defendant in the action of ejectment to shew that the lessee actually entered under the lease, for until some one else be shewn in possession, holding out the lessee, he must be regarded as possessed of the term. *Doe dem. King's College v. Kennedy*, v. U. C. R. 577.

Away-going crop.—6. In an action of trover for an away-going crop, which the plaintiff contended he was entitled to under a covenant in his lease "that he should not sow fall grain in *all* fields now cleared in the third or last year of the lease," on proving that he had not sown the grain in all the fields—the Court held, the word *all* must be construed *any*; that the lease therefore did not militate against the common law rule; and that the plaintiff was precluded from claiming the away-going crop. *Gilmore v. Lockhart et al.*, Hil. Term, 6 Vic.

Covenant to pay rent without deduction, &c.—7. A tenant who cove-

nants to pay rent without a deduction thereout, for or by reason of any matter or thing whatsoever, cannot claim a deduction for the amount of taxes paid by him for the house and premises demised. *Grantham v. Elliot*, Mich. Term, 5 Vic.

Away-going crop.—8. Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to customary right to the away-going crop is excluded; and *semble*, that there is no custom of the country as to away-going crops in Upper Canada. *Burrows v. Cairns et al.*, ii. U. C. R. 288.

II. OTHER MATTERS.

See ARREST OF JUDGMENT, 8.—BILLS OF EXCHANGE ETC., VI. 2.—BOND, II. 15.—DISTRESS, I. 4, 5.—MIDLAND DISTRICT TURNPIKE TRUST, 2, 3.

Lease for lives by tenant in tail—Death without issue determines the lease.—1. Where a tenant in tail makes a lease for lives and dies without issue, the lease is absolutely determined by his death, so that no acceptance of rent by him in remainder or reversion, can make it good. The acceptance by the remainderman of a yearly nominal rent, is not a confirmation of the lease, especially where the party disclaims holding as his tenant. *Doe dem. Graham v. Newton*, iii. U. C. R. 249.

Original lessee when compelled to pay rent after assignment of his interest, can sue assignee.—2. A lessee assigns his interest, and the assignee of the assignee neglecting to pay rent and to keep the premises in repair, the lessee is sued by the lessor, who, upon being compelled to pay the rent and damages, sues the assignee of the assignee in a special action on the case for the damage he had sustained: *Held*, that the lessee had a good right

of action on the case against the assignee for the rent and damages he had been obliged to pay the lessor. *Ashford v. Hack*, vi. U. C. R. 541.

Averment of consideration different from that contained in lease.]—3. The averment of some consideration or inducement for the making of a lease other than the annual rents mentioned in the lease, is not necessarily a contradiction of the lease, and therefore bad. *McIntyre v. The City of Kingston*, iv. U. C. R. 471.

4. A plea averring some other consideration, must shew that consideration passed and executed *before the giving of the lease*. *Ib.*

Breach of condition of lease—Plea of collateral satisfaction.]—5. After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction cannot be pleaded in bar of the action on the lease. *Ib.*

LEAVE AND LICENSE.

See APPRENTICE, 3.—PLEADING, II. 27.—SEDUCTION, 11.—TRESPASS, II. 28.

License by defendant allowing sheriff to sell his goods on the premises.]—1. Where the sheriff had seized goods under a fi. fa. and allowed them to remain on the defendant's premises on the understanding that they should be sold there on a future day if the money were not paid before, the license thus given to enter on the premises and sell the goods accordingly, cannot be revoked by the defendant. *McGillis v. McMartin*, i. U. C. R. 145.

Long possession to shew leave and license.]—2. Whether long possession of an easement in land, though it may not supply evidence of a grant, may be received in support of a plea of leave and license. See *Brown v. Street*, i. U. C. R. 124.

Replication denying plea of license—Evidence.]—3. Where in trespass the defendant pleaded a license, which the plaintiff denied: *Held*, that under such denial the plaintiff could not go into evidence that the license had been fraudulently obtained, but that if the fraud were relied upon, it should have been specially pleaded. *Slee v. Graham et al.*, ii. U. C. R. 387.

Covenant—Plea of a parol license.]—4. In an action of covenant, a plea of leave and license by parol to commit the breach, is bad. *Gwynne v. Brock*, Hil. Term, 5 Vic.

LEGACY.

See WILL, 6.

Assent of executor—Trespass.]—The assent of an executor to a legacy may be by implication as well as by express words; and where the testator devised his house to his wife for life, and also left her some personal property, and the executors in her absence entered the house to make an inventory of the property, and afterwards turned out her daughter and shut the house up: *Held*, on trespass. brought by the wife, that this was sufficient proof under the issue of excess. *Honsberger v. Honsberger et al.*, Hil. Term, 7 Wm. IV.

[The assent of an executor to a bequest is not a matter of law, but a question of fact for the jury. *Mason v. Farnell*, xii. M. & W. 674.]

LEGISLATIVE COUNCILLOR.

See PARLIAMENT, 2, et seq.

LESSEE OF THE CROWN.

See EJECTMENT, I. 26.

LETTERS.

See EVIDENCE, V. 4; VII. 3.—Post OFFICE, 1, 2.

LETTERS OF ADMINISTRATION.

See EXECUTOR ETC., I. 1; II. 7.

Letters granted by Surrogate Court of Home District to executor living in London District.]—Where to an action on a promissory note brought by an executor, the defendant having craved oyer of the letters testamentary, (which had been granted by the Surrogate Court of the Home District,) pleaded that at the time of the testator's death the defendant resided in the London District, and that therefore the letters testamentary granted by the Surrogate Court of the Home District were void, and the plaintiff demurred, the Court gave judgment against the demurrer. *King v. Claris*, Hil. Term, 2 Vic.

LETTERS PATENT.

See CROWN GRANT.—PATENT.

LEVY.

See COSTS, VI. 2; VIII. 6.—EXECUTION, 2.—FIERI FACIAS, 8.—JUDGMENT, 9.—SHERIFF, V. 15.

LIBEL AND SLANDER.

See ARREST, IV. 4.—COSTS, I(1), 9; VII. 2.—INFORMATION, 3, 4.—NEW TRIAL, IV, 4.

I. WHEN MAINTAINABLE.

II. PLEADINGS.

III. EVIDENCE.

(1), *Proof of slanderous matter as alleged in declaration.*

(2), *Evidence generally.*

I. WHEN MAINTAINABLE.

See PLEADING, X. 5.

Action against a petitioner to the Lieutenant Governor concerning the

conduct of a public officer.]—1. An action for libel will not lie against one of the signers of a petition to the Lieutenant Governor, alleging that the plaintiff as a commissioner of the Court of Requests had acted corruptly and partially, although the charge turns out unfounded, and the defendant obtained signatures to the petition of individuals who knew nothing of the charge contained in it—such a petition being a highly privileged communication. *Stanton v. Andrews*, Trin. Term, 6 & 7 Wm. IV.

2. But a complaint addressed to a public body or to government respecting the conduct of an officer, whose conduct such public body or the government may have the power of controlling, is not necessarily a privileged communication. That depends on the motives with which the communication was made. *Corbett v. Jackson*, i. U. C. R. 128.

3. An action for a libel contained in communications made to the executive government with a view of obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously and without probable cause. *Rogers v. Spalding*, i. U. C. R. 258.

A clerk in an office tells the principal that another clerk is robbing him.]

—4. Where the defendant, a clerk in the Receiver General's office, told his principal that the plaintiff, another clerk, had robbed him (the R. G.,) there being no proof that any money had been stolen, or that the Receiver General had ever suspected it: *Held*, that such communication was not privileged. *Prentice v. Hamilton*, Dra. Rep. 410.

[Also case 10, *infra*.]

Joint publication of a libel.]—5. A joint action may be maintained against several persons for the joint publication of a libel. *Brown v. Firby et al.*, Easter Term, 2 Vic.

Jurisdiction — Words imputing crime in a British colony.—6. An action will lie for words spoken in this province of a person imputing to him the commission, in a colony subject to the British criminal law, of a crime punishable by that law. *Malloch v. Graham*, ii. O. S. 341.

7. It is actionable to charge a man with having committed a felony in a foreign country. *Smith v. Collins*, iii. U. C. R. 1.

Words imputing arson.—8. An action cannot be maintained for words spoken imputing the crime of arson to the plaintiff, where from the evidence it appears that the burning of the building of which the plaintiff was accused would not have constituted such crime. *McNab v. Magrath*, Trin Term, 7 Wm. IV.

Slander of title spoken in assertion of right.—9. An action for slander of title cannot be maintained when the alleged slander is spoken bona fide and in assertion of right. *Boulton et al. v. Shields*, iii. U. C. R. 21.

Effect of words being libellous per se, irrespective of any office—What words are libellous per se.—10. Where a paper contains matter which is grossly libellous per se, and without reference to any particular situation or office to make them so, it is no objection to a verdict upon such libel that the office mentioned in the declaration was of an inferior grade; that it was not sufficiently proved that the plaintiff held such office; that there was no such office in fact; that no proof had been adduced that the person mentioned in the declaration as principal in the office was so in fact. Nor is an objection that the libel does not support the innuendoes supported by shewing that there was other matter in the libel not set out in the declaration, indicating the defendant's reason for publishing it. Nor is such libel excused on pretence of its being a formal application to the head of the

department for address of grievances. And charging a person with violating a public trust, are words libellous per se, and do not require connection with any particular office. An office may be introduced as an explanatory circumstance. *Jones v. Stewart*, Tay. U. C. R. 626.

[Everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been. Per Parke, B.—*O'Brien v. Clement*, xv. M. & W. 435.]

II. PLEADINGS.

See AMENDMENT, II. 34.—PLEADING, I. 1; VIII. 3.

Declaration on words libellous per se.—1. When words are libellous in themselves, it is not necessary to aver that they were spoken of the plaintiff in any particular character, or in reference to any particular fact. *Bell v. Stewart*, Easter Term, 11 Geo. IV.

Construction of word "charged"—Inducement of prefatory matter and colloquium to support innuendoes.—2. Held, in an action of slander where the declaration contained three counts, the 1st, charging that the defendant intending to cause it to be believed that the plaintiff had been guilty of sodomy, in a discourse which the defendant then had of and concerning the plaintiff, spoke the words following: "I saw Peter (meaning the plaintiff,) with the heifer," (meaning that the defendant saw the plaintiff commit the crime of sodomy with the heifer). The 2nd count charging, that the defendant intending as aforesaid, in a certain other discourse which he then had of and concerning the plaintiff, spoke the following words: "I saw Peter with the heifer just at the cross way," (meaning that the defendant saw the plaintiff then commit the crime of sodomy with the defendant's heifer). The 3rd count, charging that the defendant further contriving as aforesaid,

in a certain other discourse which the defendant then had of and concerning the plaintiff, spoke, &c., the words following: "I have seen Peter Johnson with my heifer; Peter Johnson is the man that did it, and I can swear to within a foot of the ground where he stood when he committed the crime aforesaid,"—that the declaration was bad, in arrest of judgment, on the ground that the word "charged" in the various counts, did not of themselves import what was intended as their meaning, and that there was no sufficient inducement or statement of prefatory matter, to which the innuendoes in the declaration could refer. (Robinson, C. J., dissentiente). *Johnson v. Hedge*, vi. U. C. R. 337.

[The inducement is that statement of preliminary facts which is necessary to make the charge understood.—Per Lord Abinger, C.B., *Wright v. Samson*, ii. M. & W. 744.]

Reference by colloquium to inducement.]—3. *Quere*: In an action of slander, as to the degree of certainty required in making the colloquium refer to the inducement—See *Marter v. Diby*, iv. U. C. R. 441.

Demurring to some words as not actionable, when others certainly are.]

—4. A defendant will not be allowed, in an action of slander, to single out some of the words of a count, and demur to them as not being actionable, while the same count contains other words uttered in the same conversation which are clearly actionable. (Macaulay, J., dissentiente). *Taylor v. Carr*, iii. U. C. R. 306.

Charge of defrauding the public—Averment of trade or occupation.]

5. When the defendant charges the plaintiff with being "a public robber," and the plaintiff admits that the defendant used the expression in a mitigated sense, by an innuendo that "he the plaintiff had defrauded the public in his private dealings with them," it is not necessary for the plaintiff to aver that he is in any office, trade or employment, in which he could have de-

frauded the public. (Macaulay, J., dissentiente). *Ib.*

Plea of "not guilty" in slander.]

—6. The plea of not guilty in an action of slander, operates not merely in denial of speaking the words, but of speaking them maliciously, in order to defame. *Keegan v. Robson*, vi. U. C. R. 375.

False accusation of perjury—Plea of justification.]

—7. The swearing falsely by a voter, at an election of aldermen or common councilmen for the City of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification, to a declaration on the case for imputing perjury to the plaintiff on the ground of such false swearing, is bad on demurrer. *Thomas v. Platt*, i. U. C. R. 217.

Slander of a physician—Recovery for slander to private character, proof of his public character having failed.]

—8. Where in a declaration in case for a libel, the plaintiff set out with an inducement of character as "a physician and surgeon, licensed to practice according to the laws of the province," it was held, that proof that he acted as such was insufficient without shewing a license, but that, as he was libelled in his private character, he was entitled to recover on that ground, notwithstanding the failure of proof of the other averment; and the omission of part of the libel which did not alter the sense, was considered immaterial. *Burwell v. Hamilton*, Hil. Term, 2 Wm. IV.

Charge of murder—Innuendo, how supported by charge.]

—9. Where in case for slander the declaration alleged that one A. had been murdered, and that the defendant had said to the plaintiff, of the deceased, "that boy who is now lying a lifeless corpse on the floor, you have been the cause of his murder, and his blood lies upon your head," meaning thereby, that the plaintiff had feloniously murdered the

said A., and the defendant demurred, because the innuendo was unwarranted by the charge—the Court held the declaration good, because it was for the jury to determine whether the words charged were spoken in the sense imputed to them. *Jackson v. McDonald*, i. U. C. R. 19.

III. EVIDENCE.

(1), *Proof of slanderous matter as alleged in declaration.*

See NEW TRIAL, II. 14.—VARIANCE, 3.

Imputation of arson—Words not supported by proof.—1. Where in case for slander the words laid in the declaration were, “he (meaning the plaintiff) burnt my barn”—meaning thereby that the plaintiff had *feloniously* burnt the barn of the defendant—and the words proved were, “there is the man that burnt my barn, if he were not guilty of it, he would not carry pistols:” it was held that the words proved did not support the declaration, and the Court directed a nonsuit to be entered. *Vankeuren v. Griffis*, ii. U. C. R. 423.

Words laid, “you robbed the mail;” proved, “I never robbed the mail, like you.”—2. Where in a case for slander the words laid were, “you robbed the mail,” and the words proved, “I never robbed the mail, like you,” held fatal. *Williams v. McBean*, Mich. Term, 2 Vic.

Words laid negatived by evidence.—3. On a declaration in case for defamation the plaintiff set out as inducement that he was treasurer of the Ottawa district, and stated the words spoken to be, “that he was guilty of the crime of perjury in a certain return which he made to the Inspector General of monies collected in 1839, 1840 and 1841 for the erection of a Lunatic Asylum, and the innuendo was, “that the plaintiff in performing his duties

of the office of treasurer, had made a false return under oath to the government of the amount of assessments received by him.” At the trial, the witnesses stated that they understood the words to mean that the plaintiff had sworn that he had *paid over* monies that he had not paid over; and after verdict for the plaintiff a new trial was granted without costs, as the meaning laid in the declaration was negatived by evidence. *Johnston v. McDonald*, ii. U. C. R. 209.

Charge, “he burnt Knox’s barn,” omitting some words.—4. Where in an action for slander the declaration charged the defendant with saying of the plaintiff, “he burnt Knox’s barn,” but that he added, “because one of the girls would not marry him,” and no notice was taken of these latter words in the declaration: *Quære*, Would there not be a fatal variance between the words as laid and proved? *Manly v. Corry*, iii. U. C. R. 380.

Proof of slanderous words themselves without proof of colloquium.—5. Where by way of introduction the declaration averred that the defendant &c., “in a certain discourse which he then and there had concerning the plaintiff, and of and concerning a certain barn upon the premises of the late Mrs. Knox, now deceased, which had been burnt,” spake and published of and concerning the plaintiff, “and of and concerning the said barn,” the false and scandalous words &c., “he burnt Knox’s barn:” *Held*, that mere proof of the defendant saying of the plaintiff “he burnt Knox’s barn,” without proof of the colloquium respecting Mrs. Knox’s barn, was insufficient. *Ib.*

Charge of stealing a bond generally, not supported by proof of a bond for the conveyance of land being stolen.—6. *Held*, that the declaration, as given in the report of this case, laying the slander in charging the plaintiff with stealing a bond, without any

inducement as to what description of bond it was, is not supported by proof of the plaintiff's having surreptitiously taken a bond for the conveyance of land to the plaintiff, which he had previously delivered up to be cancelled, the latter not being actionable under 2 Geo. II. ch. 25. *Caverley v. Caverley*, iii. O. S. 338.

(2), *Evidence generally.*

See NEW TRIAL, II. 8.

Evidence under general issue, the words being proved.—1. *Semble*: That under the general issue in an action for slander, when the words are proved, the inference of malice may be repelled. *McNab v. Magrath*, Trin. Term, 7 Wm. IV.

Admissibility of evidence under the general issue.—2. In case for libel the truth of the defendant's remarks on the report of a trial, and the evidence given thereat, is not admissible under the general issue. *Small v. McKenzie*, Dra. Rep. 183.

When necessary to find malice on the face of the evidence.—3. In case for slander the defendant may, under the general issue, shew that the words spoken were used in a privileged communication; and where the words imputed slanderous were spoken on an occasion when, either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon evidence sufficient to warrant their finding before the defendant can be pronounced guilty. *Richards v. Boulton*, iv. O. S. 95.

Evidence under plea of "not guilty."—4. All the circumstances immediately attending and preceding the speaking of the words, in slander, may be given in evidence by the defendant under the plea of not guilty. *Keegan v. Robson*, vi. U. C. R. 375.

Slander of an apothecary—Evidence to prove his being an apothecary.—5. Where in an action brought by a person describing himself in the declaration as a druggist, vendor of medicines and apothecary, the witnesses proved that several persons practising physic had purchased medicines from him, this evidence, upon a motion for a non-suit, was considered sufficient to support the verdict. *Terry v. Starkweather*, Tay. U. C. R. 68.

[Proof to support the inducement of a party being a physician, see div. II. 8, *supra*.]

In mitigation of damages.—6. In an action for slander, the defendant may give facts and circumstances in evidence in mitigation of damages. *Johnson v. Eastman*, Tay. U. C. R. 327.

Proof of innuendoes not necessary.—7. A mere innuendo is a thing in its nature not requiring any proof. *Caverley v. Caverley*, iii. O. S. 338.

LIBERUM TENEMENTUM.

See COVENANT, II(2), 4.—TRESPASS, II. 8, 22.

LICENSE OF OCCUPATION.

See EJECTMENT, I. 6, 15.

LIEN.

See DEMURRAGE, 2.—ELEGIT, 1.—JUDGMENT, 14, 26.

Builder.—1. A builder has no lien upon a house built by him on the land of his employer for the price of the building. *Johnson v. Crew*, Trin. Term, 6 & 7 Wm. IV.

[No lien exists at common law for the agistment of milch cows. *Jackson v. Cummins*, v. M. & W. 342.]

Loss or waiver of lien.—2. A. sends a waggon to B. to make the wood work.—B., having finished the wood work, sends the waggon in A.'s

name for the iron work.—B. gets the waggon back again from the blacksmith's.—A. calls for the waggon.—B. allows him to remove the box of the waggon into the highway, but on his returning to the shop to take out the running part of the waggon, B. refuses to let it go till he is paid his bill.—A. holds in his hands a quantity of notes, and offers to pay B. his demand if he would tell him what it was, B. would not name any sum, and insisted upon detaining the waggon: *Held*, that B. by sending the waggon to the blacksmith's had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon: *Held also*, that B. allowing A. to remove the box of the waggon into the highway was no waiver of his lien. *Milburn v. Milburn*, iv. U. C. R. 179.

LIFE ESTATE.

See ESTATE, *passim*.—WILL, 7.

LIMITATIONS (STATUTE OF).

I. OPERATION GENERALLY.

II. EFFECT ON CLAIM TO REALTY, AND HOW THE STATUTE MAY BE AVOIDED.

III. EFFECT ON RIGHT TO PERSONAL ACTIONS, AND HOW THE STATUTE MAY BE AVOIDED.

IV. PLEADINGS AND EVIDENCE.

I. OPERATION GENERALLY.

When statute begins to run against absentees.—1. The Statute of Limitations does not run against a plaintiff absent from the province at the time the cause of action accrues, nor until he comes here. *Forsyth et al. v. Hall*, Dra. Rep. 304.

Effect of subsequent disabilities when statute begins to run.—2. When the Statute of Limitations once

begins it continues to run, notwithstanding any subsequent disability. *Doe dem. Dixon v. Grant et al.*, iii. O. S. 511.

[*So Rhodes v. Smethurst*, iv. M. & W. 42, affirmed in error, vi. M. & W. 351.]

Against the Crown.—3. The Statute of Limitations does not run against the Crown. *Doe dem. West v. Howard et al.*, Hil. Term, 7 Wm. IV.

Plaintiff resident in England, his agent in this province.—4. The defendant pleads the Statute of Limitations; the plaintiff replies, absence in England; the defendant rejoins, that the plaintiff has an agent in this province transacting his business, and that he might have sued: *Held*, that his rejoinder would not give the defendant the benefit of the statute. *Lane v. Stennett*, iv. U. C. R. 440.

II. EFFECT ON CLAIM TO REALTY, AND HOW THE STATUTE MAY BE AVOIDED.

See CROWN GRANT, 16.—DEED, IV. 2.—DOWER, II. 4, 5.—LANDLORD AND TENANT, I. 5.—SIDE LINES.—TITLE, 17.

4 Wm. IV. ch. 1, sec. 17, *retrospective.*—1. The statute 4 Wm. IV. ch. 1, sec. 17, has a retrospective operation, and applies as well to land granted and unoccupied before as since that statute. *Doe dem. McKay v. Purdy et al.*, Easter Term, 4 Vic.

59 Geo. III. ch. 15 *does not suspend the operation of the Statute of Limitations.*—2. The operation of the Statute of Limitations is not suspended by the 59 Geo. III. ch. 14. Where twenty years' possession has followed a division of adjacent lots, ejectment will not lie, although the division may have been inaccurate. *Doe dem. Stewart v. Radich*, Tay. U. C. R. 679.

Forfeiture by a traitor of his property, part of which had been occupied by another for nearly twenty years

before such forfeiture, but more than twenty years before ejectment.]—3.

A. and B. having received grants from the Crown for adjoining lots, A. inadvertently occupied, fenced and improved a portion of B.'s lot, according to the mode of running side lines prescribed by 59 Geo. III. ch. 14, believing it to be a portion of his own lot. Some years after, B.'s lot was confiscated under the Alien Act 54 Geo. III. ch. 9, and sold under 59 Geo. III. ch. 12. A., and those claiming under him, had held the disputed tract for upwards of twenty years at the time of action brought, but not at the time B.'s estate was confiscated, and the Crown became seized by inquest of office: *Held*, that A.'s occupation did not work a disseisin of B., and that B. continued seized so as to entitle the Crown to that portion of his lot in A.'s possession, and that the bargainee of the Crown commissioners could maintain ejectment against the occupiers thereof. *Doe dem. Howard v. McDonnell*, Dra. Rep. 386.

[See cases 20, 21, 22, 25, 26, *infra*.]

Adverse possession for twenty years —4 Wm. IV. ch. 1, sec. 52.]—4.

When in ejectment it is necessary to leave the question of adverse possession in the defendant for twenty years as a doubtful point to the jury, it is not a case in which a plaintiff can be allowed to remedy legal defects in his title by availing himself of the provisions contained in 4 Wm. IV. ch. 1, sec. 52, and giving notice to the defendant as an intruder, or one having no claim, or color of claim to the possession. *Doe dem. Lyons v. Crawford*, Easter Term, 5 Vic.

Successive trespassers—4 Wm. IV. ch. 1, sec. 52.]—Quare: The effect of a succession of trespassers taking possession of deserted land at intervals, and not claiming under each other? The application of the 4 Wm. IV. ch. 1, sec. 52? *Doe dem. Baldwin v. Stone*, v. U. C. R. 388.

What a permissive, not adverse possession.]—5. Where on a question of adverse possession it was proved that a line had been agreed on by the proprietors of adjoining lots, by which they agreed "to abide as long as we live, and if our children find it wrong they may correct it:" *Held*, that this was a permissive occupation, and could not be considered as an adverse holding. *Doe dem. Murney et al. v. Markland*, Mich. Term, 6 Vic.

Permissive possession—The effect of it at the end of twenty years.]—6.

Quare: As to the effect of the Statute of Limitations when the twenty years' possession has not been an adverse one, when a person has gone into possession with the consent of the plaintiff, as an act of kindness on his part, and has remained there under the same assent, paying no rent, and acknowledging no title. *Doe dem. Smyth v. Leavens*, iii. U. C. R. 411.

Twenty years' possession, adverse or permissive, gives a title.]—7. Where

A. has been twenty years in possession, paying no rent, and signing no written acknowledgment of title in another, such possession, whether it originate adversely to the claims of the true owner B., or with *his permission*, operates, under the Statute of Limitations, to extinguish the title of B. and vest the title in A. *Doe dem. Perry et al. v. Henderson*, iii. U. C. R. 486.

Verbal acknowledgment insufficient to save the statute.]—8. *Held*, that a verbal acknowledgment of title by A. in B., made during the twenty years would not save the statute. *Ib.*

Acknowledgment in writing after twenty years insufficient.]—9. *Held* also, that A.'s acknowledgment in writing after the twenty years could not have the effect of reviving a title which the twenty years' possession had extinguished. *Ib.*

Judgment in ejectment after twenty years insufficient.]—10. *Held* also, that a judgment recovered by B. against

A. *after* the twenty years had expired would not save the statute; *aliter*, if recovered *within* the twenty years, and A. *within* the twenty years had been dispossessed upon such judgment. *Ib.*

[See also case 17, *infra*.]

Conveyance of part of lot within twenty years of no effect.—11. Held, also, that a conveyance by B. to A. within the twenty years of part of the lot in dispute would not save the statute, his deed to A. being no written acknowledgment on the part of A. of B.'s title. *Ib.*

Payment of taxes by party in possession.—12. Held, also, that the fact of A.'s paying the taxes by B.'s direction is no bar to the statute. *Ib.*

Possession under contract to purchase.—13. Held, also, that A. commencing his possession by the permission of B., and upon a contract to purchase, B. must be held as in the actual possession of the land, through his tenant at will, A., and as being dispossessed at the end of the first year's tenancy, and that therefore the 17th section of our Provincial Statute of Limitations would apply so as to bring B. within its operation. *Ib.*

[See also case 24, *infra*.]

Party in possession occupying as servant.—14. *Semble*: That if A. could have been shewn to have been occupying the land as the servant of B. during the twenty years, and not for his own use or benefit, the statute would not run. *Ib.*

[Occupation of a son—See case 19, *infra*.]

Possession under agreement to purchase—Default—Conveyance to third party with defaulter's knowledge.—

15. A. the owner of land, agrees to sell to B.—B. goes into possession and fails in making his payments.—A. then conveys the land to C. in B.'s presence, and apparently with the consent of B., who says that he will at once leave the place.—B. nevertheless continues uninterruptedly in pos-

session for more than twenty years, paying C. no rent, and making no written or other acknowledgment of C.'s title: Held, that B.'s twenty years' possession, under these circumstances, gives him the legal title. *Doe dem. Ausmyn et al. v. Minthorne*, iii. U. C. R. 423.

Notice to quit from C. to B. within twenty years no bar.—16. Held also, that a notice to quit from C. to B. within the twenty years does not save C. from being barred by the statute. *Ib.*

Judgment within twenty years, no proceedings being taken thereon, no bar.—17. Held also, that a judgment in ejectment recovered by C. against B. within twenty years, but upon which B. had never been dispossessed, is no bar to the statute. *Ib.*

Voluntary delivery of possession by B. to C. after twenty years.—18. *Quare*: If B., in undisturbed possession for twenty years, voluntarily restores possession to C., can B. turn C. out again by reverting to his title under the act? *Ib.*

Son as against his father after twenty years' possession without acknowledgment.—19. Where a son has been allowed by his father to remain in possession of land for twenty years, and it cannot be shewn that he was there as the servant or agent of his father, or has paid rent within the twenty years, or had acknowledged the father's title in writing, the father will lose his title, no matter what the verbal tacit understanding of both parties as to the real ownership might have been. *Doe dem. Quinsey v. Caniffe*, v. U. C. R. 602.

When begins to run against realty mortgage—How barred.—20. A patent was granted to A. of part of lot number four, and to B. of part of lot number five. More than forty years before action brought, a division fence had been run between what was then supposed the boundary line of

lots four and five, according to which the proprietors of the two lots had ever since respectively occupied. C., (the defendant in this ejectment,) holding under B.'s patent, claimed a part of lot number four, not as embraced in the patent, but as being actually possessed by him and others before him in the title of B. as part of lot five, and so considered, both by the proprietors of four and five until very recently. D., (the lessor of the plaintiff,) claiming under A.'s patent, brought his action against C. to recover part of lot four, notwithstanding C.'s possession of the part for more than forty years, hoping to do away with the effect of the Statute of Limitations by proof of the following facts.—A.'s patent was issued in 1796; A. in February 1802 mortgaged in fee to E. to secure the payment of 825*l.* in October 1802. In 1810, E. conveyed in fee to F. In 1829 the heir of F. brought ejectment against A. the mortgagor, who had remained in possession since the mortgage of 1802, and recovered. Nothing was shewn to have been actually done by either of the parties claiming through A. to disturb C.'s possession under the old division line. But *held*, that the Statute of Limitations had commenced to run against A. from the time of B.'s possession of the land under the old division line; that neither the mortgage given by A. nor the ejectment brought against him, had any effect upon the statute, and therefore C.'s title, (the defendant in this suit), under the possession of B., must prevail. *Doe dem. Dunlop v. Servos*, v. U. C. R. 285.

Actual exclusive occupation of land necessary.—21. To enable the Statute of Limitations to operate in bar of the true title to land, there must be an actual occupation, to the exclusion of the real owner. Where, therefore, a party having permission given him to occupy the west half of the lot, did confine himself, so far as residence and cultivation went, to that half, and only

committed depredations on the other half—it was held, that he could not be considered as having exclusive possession of both halves. *Doe dem. McDonell v. Rattray*, vii. U. C. R. 321.

Adverse possession of a certain enclosed piece does not extend beyond the limits of such enclosure.—22. Where A. and B. were proprietors of adjoining lots, and B. had encroached for more than twenty years on part of A.'s land which was cleared, and B.'s fence which enclosed the encroached land would, if protracted, also have enclosed a portion of A.'s wood-land, which had never been fenced: *Held*, that B.'s adverse possession of the fenced land could not be extended to the wood-land which his fence, if protracted, would have enclosed. *Doe dem. Hill v. Gander*, i. U. C. R. 3.

[See also case 26, *infra*.]

Conveyance by a lunatic.—Undisturbed possession by bargainee, till statute confirmed his title.—23. In 1822, A., a maniac, conveyed land to B., who then entered into possession. A. died in 1826.—C., his eldest son and heir, became of age in 1829.—He died in 1829, and his brother and heir, D., (the lessor of the plaintiff), became of age in 1831, and brought his ejectment against B., on the ground that his father was non compos at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after our statute 4 Wm. IV. ch. 1: *Held*, that D., under these facts, was barred from recovery by the Statute of Limitations; and *held also*, that B. could not be considered in possession as the servant or bailiff of the lunatic. *Doe dem. Silverthorn v. Teal*, vii. U. C. R. 370.

Tenancy at will.—When statute commenced to run before the passing of 4 Wm. IV. ch. 1.—24. A., in 1817, makes an agreement with B. to purchase land, and is let into posses-

sion.—B. dies before the passing of the provincial act 4 Wm. IV. ch. 1.—C., the son of A., makes a bargain with D., the husband of the lessor of the plaintiff, to whom B. had devised the land, and fails in his payments, upon which an action of ejectment is brought to dispossess him, and is discontinued at his request in 1834; after this, the lessor of the plaintiff brings her action of ejectment: *Held*, upon these facts, that A. became a tenant at will to B. in 1817, that upon B.'s death his tenancy at will determined; that that relation being at an end before the act 4 Wm. IV. ch. 1 was passed, the time which elapsed under such circumstances was not to be taken into account as a part of the twenty years necessary to make a title by possession; that the ejectment brought in 1834, while it determined the tenancy at will, gave no new starting point, and had no retrospective operation; that the lessor of the plaintiff, by her consenting to the defendant's remaining on the land, after the interview of 1834, revived the tenancy at will, and that as twenty years had not elapsed since that period, the lessor of the plaintiff was entitled to recover. *Doe dem. Kingsbury v. Stewart*, v. U. C. R. 108.

Twenty years' acquiescence in an erroneous boundary.—25. Twenty years' possession, according to a certain boundary line, will bar an ejectment brought to disturb such boundary, unless a new survey can be made strictly in accordance with the provisions of 59 Geo. III. ch. 14. *Doe dem. Morgan v. Simpson*, Trin. Term, 1 & 2 Vic.

A division fence dispossesses the owner only of the land actually enclosed.—26. Where A. had improved on the front of his lot, and laid a division fence between himself and his neighbor, so far as his improvements extended, which fence was found, upon a correct survey, to enclose part

of the adjacent lot: *Held*, that though the Statute of Limitations might bar the owner of the adjacent lot from regaining possession of the portion of his lot which he had suffered his neighbor to enclose for more than twenty years, yet that would not affect the right of the latter to any other portion of his land not actually enclosed, as he could not be held to be constructively dispossessed of that portion of his lot which the erroneous fence, if protracted, would embrace. *Doe dem. Beckett v. Nightingale*, v. U. C. R. 518.

Mortgage satisfied after twenty years' possession subsequent to default.—27. When the mortgagor is in possession, a mortgagee may be presumed satisfied when twenty years have elapsed from the time of the payment of the mortgage money. *Doe dem. McGregor v. Hawke*, Easter Term, 7 Wm. IV.

Possession of mortgagor under 21 Jac. I.—28. Under the old Statute of Limitations, 21 Jac. I., the possession of the mortgagor, when not adverse, would not bar the mortgagee. *Doe dem. Dunlop v. McNab*, v. U. C. R. 289.

Conveyance in fee by mortgagee when mortgagor in possession.—29. The mortgagor being in possession at the time of a conveyance in fee by the mortgagee, is no objection to the conveyance—the doctrine of disseisin not applying as between the mortgagor and mortgagee. *Ib.*

If entry be not made on default, mortgage will be presumed satisfied.—30. When interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and consequently, that the mortgagee has no subsisting title. *Ib.*

If entry be not made within twenty years, nor interest paid, title in mortgagor.—31. Where a mortgagee has neither taken possession of the land mortgaged, after default, nor received

interest upon the mortgage money within twenty years, the title is in the mortgagor, and the mortgagee, if suing in ejectment a third party in possession, may be non-suited. *Doe dem. McLean et al. v. Fish et al.*, v. U. C. R. 295.

Disseisin of mortgagee by mortgagor's possession.]—32. Neither the mortgagee nor his assignee can be disseised by the mortgagor continuing in possession. *Doe dem. Carey et al. v. Cumberland*, vii. U. C. R. 494.

Disseisin of mortgagee by the possession of mortgagor's heir.]—33. Where the heir and the widow of the mortgagor remained in possession for more than twenty years after the death of the ancestor, but had frequently recognized the title of the mortgagee: *Held*, not to be a disseisin. *Doe dem. Dunlap v. M'Dougal*, Tay. U. C. R. 640.

III. EFFECT ON RIGHT TO PERSONAL ACTIONS, AND HOW THE STATUTE MAY BE AVOIDED.

See CONTRACT, 2.

When the statute begins to run on a note payable to bearer.]—1. The right of action on a note payable to A. or bearer, does not accrue to a third person as bearer till an actual delivery to him; and when C., being in the United States, purchased a note payable to bearer, and on his coming into this province got possession of it, and brought an action upon it, to which the defendant pleaded "actio non accrevit infra sex annos," and the plaintiff replied, he was in foreign parts when the cause of action accrued: *Held*, that the facts did not warrant a verdict upon this issue for the plaintiff, as the cause of action accrued to him when he received the note, which was within six years and within this province, and not when he made the purchase in the United States. *Shaw v. Matthison*, iii. O. S. 74.

Case for fraudulent misrepresentation — When statute begins to run.]

—2. In case for fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery. *Dixon v. Jarvis*, Mich. Term, 2 Vic.

Exception in Jac. I., extends to actions of account only.]—3. The exception in the Statute of Limitations extends to actions of account, not to actions of assumpsit on open accounts. *Russell et al. v. Robertson*, i. U. C. R. 235.

Evidence necessary, generally, to take a case out of the statute.]—4. To take a case out of the Statute of Limitations, slight evidence is sufficient, but the recognition of liability must be unequivocal, or the promise must be *unconditional*, or the *condition* performed. *Carpenter v. Vanderlip*, Easter Term, 3 Vic.

Acknowledgment by an executor.]—5. An admission by an executor that a promissory note, barred by the Statute of Limitations, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient to take the case out of the statute. *Lampman et al. v. Davis et al.*, i. U. C. R. 179.

6. An admission by an executor of a debt due by his testator is not sufficient to take the case out of the Statute of Limitations, in an action against the executor without an express promise on his part to pay the debt admitted; but an account stated by an executor of a debt due by his testator, which had never before such accounting been ascertained or determined, is sufficient to charge the executor as a substantive debt, without any promise to pay. *Watkins v. Washburn*, ii. U. C. R. 291.

Sufficiency of admission by party indebted, when presented with the

account.]—7. A statement of a party upon being presented with an account and payment demanded, "that he was satisfied the amount had been paid to the plaintiff's agent, that the agent had been in the habit of having large transactions with him, and was more frequently in debt than otherwise, but that he could not see how the matter stood, as he had not his books to refer to:" *Held*, not to be sufficient to take the case out of the Statute of Limitations. *McCormack v. Bercey*, i. U. C. R. 388.

8. A statement by a defendant "that he did not think he owed the money, and that if he did the Statute of Limitations would prevent the recovery, but that he would give the plaintiff fifty dollars rather than have any trouble about it," is not sufficient to take the case out of the Statute of Limitations. *Spalding v. Parker*, iii. U. C. R. 66.

What is an open account.]—9. *Quære*: When can an account be considered an open unsettled account, so as to defeat the operation of the Statute of Limitations, by the latter items in the account drawing the others with them? *Hamilton v. Matthews*, v. U. C. R. 148.

When the principle of later items drawing others with them, is not applicable.]—10. The principle that the later items of an account draw the others after them, and thus save all from the Statute of Limitations, does not apply when quarterly payments, (e. g. for rent or tuition), as for a late specific independent quarter due at the time of payment, unmixed with items for any earlier quarter; the presumption in such a case is, unless the contrary be shewn to be the fact, that the earlier quarters have been all paid and satisfied. *King's College v. McDougall*, v. U. C. R. 315.

Sufficiency of admission.]—11. *Held*, that a conversation in which the defendant admitted "that the plaintiff

had a judgment against him, that he (the defendant) had no means of paying it, but that if they would be reasonable he thought his friend could assist him, adding, that he was entitled to some credits, which the plaintiff had not allowed him, and that if they would accept land, he thought he could manage to pay them 1000*l.* in that way," coupled with a letter, in which the defendant proposed to the plaintiffs to make over to them for their claims against him about 600 acres of land, was sufficient admission of a debt of 1000*l.* under the account stated, to take the case out of the Statute of Limitations. *Russell et al. v. Cryder*, v. U. C. R. 484.

Note—Promise to pay by one joint and several maker.]—12. A promise to pay by one of several joint and several makers of a note, will take the case out of the Statute of Limitations. *Sifton v. McCabe et al.*, vi. U. C. R. 394.

[So will the payment of interest by one of two makers — *Channell v. Ditchburn*, v. M. & W. 494.]

Sufficiency of admission.]—13. *Held*, that the following admissions of the defendant, "The notes are genuine; that is, I made them; but I am under the impression that they were paid through Messrs. A. and B., and I don't think I am called upon to have any further conversation with you about them," were not sufficient to take the case out of the Statute of Limitations. *Grantham v. Powell*, vi. U. C. R. 494.

Admissions by an attorney of monies being received for his client.]—14. The following answer of an attorney to his client, when demanding payment of the monies left for collection, "that the debt had not been paid, and that the defendant had no property, and that he (the attorney) could not help the debt being unpaid," not containing an express promise to pay, or admission from which a promise could

be implied : *Held*, not sufficient to take the case out of the Statute of Limitations, though it was subsequently proved that at the time of such answer the attorney had collected the client's debts. *Dougall v. Cline* (executors of), vi. U. C. R. 546.

[The provincial statute 13 & 14 Vic. ch. 61, sec. 1, enacts, among other things, that in all actions on simple contract (of the nature mentioned in the preamble of the act) no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, to take any case out of the Statute of Limitations, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, signed by the party to be chargeable thereby.]

IV. PLEADINGS AND EVIDENCE.

See ATTORNEY, II(3), 11.

Plea.]—1. A plea of the Statute of Limitations concluding to the country, is bad. *Baldwin et al. v. McLean*, i. U. C. R. 222.

2. A plea of the Statute of Limitations stating that the causes of action, "if any such there were, or still are," did not accrue within six years, is bad on special demurrer. *Meyer v. Burke*, Hil. Term, 6 Vic.

3. Where in assumpsit on a promise to indemnify, the defendant pleaded that more than six years had elapsed since the promise accrued, the plea was held bad on general demurrer. *Ives v. Ives*, Trin. Term, 3 & 4 Vic.

Replication to plea of, by sheriff.]—4. To a plea of the Statute of Limitations in assumpsit, a replication that the defendant was a sheriff, and that the amount claimed was an overplus remaining in his hands of money levied under a fieri facias, was held bad on general demurrer, although the plaintiff might have evaded the statute had she declared in case, setting out the circumstances specially. *Rugles v. Beikie*, ii. O. S. 370.

Plea, that both defendant and plaintiff resided in a foreign country

when cause of action accrued.]—5. A plea that the defendant and plaintiff were both resident in a foreign country when the cause of action accrued, and that by the laws of that country the defendant is discharged, because no action was brought there within six years, the defendant and plaintiff having both resided there during all that time, was held bad on general demurrer. *Hart v. Wilson*, Trin. Term, 2 & 3 Vic.

Replication, that the plaintiff was beyond the seas, &c.]—6. In a replication to a plea of the Statute of Limitations that the plaintiff was in parts beyond the seas when the action accrued, a place where the plaintiff was must be alleged, or the replication will be bad on special demurrer. *Hannay v. Bell*, Mich. Term, 5 Vic.

Replication, that the plaintiff was resident in foreign parts—Rejoinder, that defendant resided there also.]—7. To a plea of the Statute of Limitations in assumpsit on a promissory note, the plaintiff replied that at the time the cause of action accrued he was resident in Lower Canada, and the defendant rejoined that he was also resident in Lower Canada all that time, the rejoinder was held bad on demurrer. *Simpson v. Privat*, ii. U. C. R. 265.

8. To a plea of the Statute of Limitations the plaintiff replied absence beyond the seas; to this the defendant rejoined, that after the making of the promises &c., and upwards of six years before the commencement of this suit, viz: on &c., he, the defendant, was at London in England, and where the plaintiffs then resided, and continued there for ten days, of which the plaintiffs had notice, and that the plaintiffs did not commence their action within six years after he had returned to Upper Canada. To this the plaintiffs demurred. *Held*, demurrer good. *Lane et al. v. Small*, iv. U. C. R. 448.

Averment of promise to intestate not supported by promise to the administrator.—9. In an action by an administrator, a replication of a promise to the intestate, in answer to a plea of the Statute of Limitations, is not supported by proof of a promise to the administrator. *Wright v. Merriam*, Mich. Term, 5 Vic.

Replication that defendant resident in foreign parts, &c.—Question for the jury.—10. Where to a plea of non-assumpsit infra sex annos, a plaintiff replies the residence of the defendant beyond the jurisdiction of the court at the time when the action accrued, and the commencement of the action within six years after the return; the sufficiency of proof of these facts is a question for the decision of the jury, and not a ground of non-suit. *Johnson v. Buchanan*, i. U. C. R. 171.

Action by husband and wife—Replication of absence beyond the seas—Evidence.—11. Where in an action by husband and wife on a contract made with the wife before marriage the defendant pleaded the Statute of Limitations, to which the plaintiffs replied absence beyond the seas, and that they never had come into this province, upon which the defendant took issue, and upon the trial it was proved that the wife had never been in this province, and it appeared she had been married in Scotland—the Court refused a non-suit to be entered on leave reserved, on the ground that it had not been shewn that the husband never was in this province. *Greig et ux. v. Baird*, i. U. C. R. 472.

Immaterial issues.—12. To a plea of the Statute of Limitations the plaintiff replied that when the cause of action accrued he was in foreign parts, &c., and did not return to this province till the 1st of July 1846. The defendant rejoined that the plaintiff did not, on the day named, or at any time, return to Upper Canada. Upon

this, the defendant proved that the plaintiff was not at any time in this province, and asked to non-suit the plaintiff: but held, that the issue was immaterial, and the defendant not entitled to a non-suit. *Crosby v. Collins*, v. U. C. R. 546.

LIMITS.

I. LIMITS GENERALLY.

II. BOND AND PROCEEDINGS THEREON

I. LIMITS GENERALLY.

See CLERK OF THE CROWN AND PLEAS, 1, 2.—EJECTMENT, VI. 2. FALSE IMPRISONMENT, 1.—INSOLVENT ETC., 7.—SHERIFF, I. 7.

Who entitled to.—1. A prisoner in custody for contempt may have the benefit of the limits. *Rex v. Kidd*, Hil. Term, 6 Wm. IV.

2. Debtors in custody on mesne process, as well as on final process, may have the benefit of the limits. *Montgomery v. Howland*, Easter Term, 2 Vic.

Demand of statement of effects—Service of rule nisi for commitment.—3. The demand on a debtor on the limits for a statement of his effects, if in writing, must be signed by the plaintiff or his attorney, and the rule nisi for his commitment personally served. *Meighan v. Reynolds*, iv. O. S. 19.

Debtor willing to assign his property to all his creditors, but not to one in particular, committed.—4. Where a defendant in execution on the limits, on demand from the plaintiff's attorney, gave him a schedule of debts due to him, and property belonging to him, amounting to more than 2000l., and offered to assign the whole for the benefit of all his creditors, but refused to give up any part to the plaintiff alone, he was ordered to be committed to close custody under 4 Wm. IV. ch. 10. *Bruneau v. Joyce*, Easter Term, 7 Vic.

Form of order for committal to close custody.—5. An order for the committal to close custody of a debtor upon the limits should be directed to the sheriff, and follow the form prescribed in the statute. *Hamilton v. Anderson*, ii. U. C. R. 452.

Application to judge in vacation to commit debtor &c.—Appeal.—6. A judge, when applied to in vacation under the act 4 Wm. IV. ch. 10, sec. 4, for the commitment of a debtor on the limits to close custody, disposes of the case without the power of appeal, by declining to interfere. *Shaw et al. v. Nickerson*, and *Gillespie et al. v. Nickerson*, vii. U. C. R. 541.

II. BOND AND PROCEEDINGS THEREON.

See AMENDMENT, III. 1.—ATTORNEY, II(3), 4.—ESCAPE, 22.—NEW TRIAL, I. 3.—PARTICULARS OF DEMAND, 2.—SHERIFF, IV. 1, 8.

When void under 23 Hen. VI. ch. 9.—1. A bond conditioned that a debtor shall confine himself to the limits of the gaol is void under the statute 23 Hen. VI. ch. 9, if at the time of its execution the debtor was not in custody nor on the limits. *Campbell v. Lemon*, ii. O. S. 401.

Extent of limits mistaken by debtor.—2. *Semble*: That a bond to the limits is not broken where the debtor has not willingly withdrawn from the limits, but has been misled as to their extent, and gone beyond them without any idea that he was transgressing. *Lewis v. Grant*, i. U. C. R. 290.

Blank filled up with debtor's consent—Variance.—3. A blank having been left in a bond to the limits, which was afterwards filled up with the consent of the debtor, although not in his presence, was held no variance on the plea of non est factum. *Leonard v. Meritt*, Dra. Rep. 294.

On an attachment for non-payment of money—Assignment.—4. A bond to the limits may be taken on

an attachment for non-payment of money, and may be assigned. *Montgomery v. Howland*, Easter Term, 2 Vic.

Bond within 8 & 9 Wm. and Mary ch. 11—Suggestion of breaches.—5. Where the condition of a bond is set out on oyer, and it appears on the record by that means that the bond is within the statute 8 & 9 Wm. and Mary ch. 11, the plaintiff ought to suggest his breaches before trial, and cannot take a verdict for the penalty and suggest breaches afterwards. *Campbell v. Lemon*, ii. O. S. 401.

Necessary averments in declaration.—6. In a declaration on a bond to the limits, given by a debtor in execution, it is necessary to shew the judgment, writ, and execution of the debtor, and the execution of the bond while he was in custody; and the recital of those facts in the bond set out in the declaration will not be sufficient. *Leonard v. McBride*, iii. O. S. 1.

Averment of limits being assigned by justices.—7. In a declaration on a bond to the limits, an averment that the justices in Quarter Sessions assigned limits to the gaol is sufficient, on general demurrer; and the bond is not avoided altogether because part of the condition is contrary to the statute. *Stebbins v. O'Grady et al.*, Easter Term, 2 Vic.

[By the statute 10 & 11 Vic. ch. 15, it is enacted, "that the gaol limits, to the respective gaols in each district, shall henceforth be and consist of the whole of such district."]

Variance.—8. Where in a declaration on a bond to the limits the condition set out was, that the debtor should not depart from the limits, and the defendant, on oyer, shewed the condition to be that the debtor would remain on the limits until the debt was paid, or he should be legally discharged from the limits, and demurred: *Held*, a fatal variance. *McGuire v. Pringle*, Mich. Term, 3 Vic.

Averment of defendant being bound—Plea, nil debet.—9. In an action

on a bond to the limits, it should be shewn in express terms, and not merely by implication, that the defendant became bound, and where it did not expressly appear in the declaration, and no profert of any bond was made, a plea of "nil debet" was held good on demurrer. *Douglas v. Murchison*, Hil. Term, 3 Vic.

Right of action by sheriff.—10. In an action by a sheriff on a limit bond it is not necessary to show that the sheriff has actually sustained a pecuniary damage. *Kingsmill v. Gardiner et al.*, i. U. C. R. 223.

Assessment of damages after interlocutory judgment.—11. The plaintiff must assess his damages after interlocutory judgment, in debt on a bond to the limits. *Callagher v. Strobridge et al.*, Dra. Rep. 167.

Action by sheriff's assignee—Plea, cancellation or surrender.—12. To debt on a bond to the limits by the sheriff's assignee, it is a good plea, that after breach and before the assignment to the plaintiff, the sheriff delivered up the bond to the debtor to be cancelled; but it is no answer that the debtor was surrendered after breach, if the bond were not cancelled. *Le Mesurier v. Smith*, ii. O. S. 479.

Pleas of voluntary return, surrender, or recaption, not pleas in bar.—13. In an action by the assignee of the sheriff of a bond to the limits, a voluntary return, or a surrender, or a recaption by the sheriff before action, and before assignment of bond, are no pleas in bar. *Evans v. Shaw*, Dra. Rep. 14.

Action against bail—Plea of debtor's escape without their knowledge, &c.—14. It is no plea to an action by the assignee of a bond to the limits against the sureties that the debtor, before the assignment of the bond, left the limits for an hour, without their knowledge or consent, and afterwards and before the commencement of the action returned to the limits, and still continued

thereon. *McMahon v. Masters et al.*, Mich. Term, 7 Vic.

Admission of debtor to charge sureties.—15. An admission by a debtor on the limits that he had gone beyond them, is not admissible to charge his sureties. *Freeland v. Jones*, Mich. Term, 3 Vic.

LIQUIDATED DAMAGES.

See PENALTY.

LOCATEE OF THE CROWN.

See CASE (ACTION ON THE), 3.—EJECTMENT, I. 6.

LODGING.

See ARREST OF JUDGMENT, 10.

LONDON BOARD OF POLICE.

See LONDON (TOWN OF).

LONDON (TOWN OF).

See BILLIARD TABLES, 2.—BY-LAWS, 2.—PLEADING, II. 20.

By-law restricting the sale of meat.

—1. The Corporation of the Town of London has the power to make a by-law, prohibiting the sale of butchers' meat within certain hours, except at the public market. *Peters v. The President and Board of Police of London*, ii. U. C. R. 543.

Power to establish a market and appoint fees.—2. *Quære*: Does the act 3 Vic. ch. 31, give the Board of Police of London power to establish and regulate a market and appoint fees to be taken thereat? *The Board of Police of London v. Talbot*, iii. U. C. R. 311.

Corporation sole judges of the qualifications of their members.—3. *Held*,

that under the statute 10 & 11 Vic. ch. 48, the Corporation of the Town of London are the sole judges of the return and qualifications of candidates for seats in the Common Council, and that their decision is final. *Balkwell In re*, v. U. C. R. 624.

LORD'S DAY.

See SUNDAY.

LOST BILLS OF EXCHANGE.

See BILLS OF EXCHANGE ETC., V. 6.
EVIDENCE, II. 13.

LOTTERY.

See GAMING, 6, 7.

LOWER CANADA.

See BILLS OF EXCHANGE ETC., III. 13, 14.—CAPIAS AD SATISFACIENDUM, 1.—FOREIGN JUDGMENT, 10, 12.—FOREIGN LAW, 3.—LIBEL AND SLANDER, 1. 6.

Examination of married women.—A circuit judge in Lower Canada, under the act 7 Vic. ch. 18, sec. 16, has the power of examining married women respecting their consent to convey their estate. *Doe dem. Park et al. v. Henderson*, vii. U. C. R. 182.

LUNATIC.

See LIMITATIONS (STATUTE OF), II. 23.

MACADAMIZED ROAD COMMISSIONERS.

See MIDLAND DISTRICT TURNPIKE TRUST.

MAGISTRATES.

See ARREST, IV. 10.—FALSE IMPRISONMENT, 7.—FLOUR.—GAOLER, 2, 3, 4.—GENERAL ISSUE, 4, 5. INDEMNITY BOND, 11.—INFORMATION, 2.—MANDAMUS, 18.—NEW TRIAL, III. 1.—NOTICE OF ACTION, *passim*.—QUARTER SESSIONS.—TRESPASS, I. 6; II. 26.—WARRANT.

Not liable to trespass for committing on charge of felony.—1. Where magistrates commit a person upon a general charge of felony given upon oath they will not be liable to an action of trespass, although the facts sworn to in order to substantiate that charge may not in point of law support it. *Gardner v. Burwell et al.*, Tay. U. C. R. 247.

Requisites of commitments for contempt.—2. A justice may commit for contempt while in the execution of his office out of sessions, but the commitment must be by a warrant in writing, and for a specified period. *Jones v. Glasford*, Mich. Term, 2 Vic.

3. A commitment by a magistrate for contempt, if there be no recorded conviction, should shew that the party was *convicted* of contempt; stating that he was *charged* with contempt is insufficient. *McKenzie et al. v. Mewburn*, Easter Term, 7 Vic.

Commitment for contempt—As to appeal on the facts.—4. While a power resides in any court or judge to commit for contempt, it is in the power or privilege of such court or judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *Clarke et al., In re*, vii. U. C. R. 223.

Order for commitment not in writing.—5. Where a person was brought before a magistrate on a charge of a threatened assault, and was ordered by the magistrate to find sureties to keep the peace, which not being immediately able to do, he remained in the custody of a police constable for three hours,

during which time the magistrate frequently visited him to ascertain if he had found bail, and at night, not having found bail, he was taken to gaol, where he remained until the following morning when he was discharged on bail being procured: *Held*, that the order for commitment was good without being in writing, and that the magistrate was therefore not liable to trespass. *Lyn-den v. King*, Mich. Term, 7 Vic.

Commitment for malicious injury to property.—6. *Quære*: Would a complaint against A. that he “was seen in the act of destroying or injuring private property,” without alleging that the property belonged to another person, or that the act was wilfully or maliciously done, authorize a warrant as for a malicious injury to property under 4 & 5 Vic. ch. 26? *Powell v. Williamson*, i. U. C. R. 154.

Verbal order to arrest after departure of prisoner from Court.—7. When a magistrate allows a prisoner to depart without examining into the charges against him, with a direction to appear next morning at the police office, and in the meantime, on the ground that he was assaulted by the prisoner when in custody before him, gives a verbal order to a constable to apprehend him and take him to the station house or gaol, such imprisonment is illegal, and the magistrate cannot justify the arrest. *Ib.*

One justice may take bail.—8. Although a statute may require the presence of three justices to convict of an offence, yet one has power to bail the offender. *King v. Orr*, Easter Term, 2 Vic.

Jurisdiction in cases of master and servant.—9. *Semble*: The statute 5 Eliz. ch. 4, is not in force in Upper Canada, but the statute 20 Geo. II. ch. 19 is in force; and under the third and fourth clauses of the latter statute, jurisdiction is given to two or more justices, and cannot be exercised by one, and the party cannot be arrested

on the complaint—he must be summoned. *Shea v. Choat*, ii. U. C. R. 211.

Form of action against.—10. Cattle supposed to have been stolen are taken by A., a constable, to B. an inn-keeper, to feed and take care of. After some time B., wishing to be paid for his keep of the cattle, applies to C., a magistrate, who had nothing to do with the original caption, for directions. C. tells him to sell the cattle and satisfy his claim.—This B. does.—D., the owner of the cattle, sues C., the magistrate in trespass: *Held*, that as against the magistrate, trover, and not trespass, should have been the form of action. *Semble*: that under these circumstances he would not be liable to the owner of the cattle in trespass. *Marsh v. Boulton*, iv. U. C. R. 354.

Jurisdiction in repressing election riots.—11. Under the statute for repressing riots at elections, no power is given to magistrates to convict summarily—the offenders must be tried by a jury. *Fergusson v. Adams et al.*, v. U. C. R. 194.

Warrant under Summary Punishment Act.—12. Under the Summary Punishment Act magistrates cannot issue their warrant to imprison *absolutely* for so many days, only to imprison for so many days unless the fine and costs be sooner paid. *Ib.*

Conviction, how far a protection.—13. A conviction made by a magistrate, so long as it has not been set aside, protects him against an action of trespass. *Gates v. Devenish*, vi. U. C. R. 260.

MAINTENANCE (STATUTE OF), SEC. 2.

See CROWN GRANT, 3.—PENAL ACTION, 2.

32 Hen. VIII. ch. 9, in force here.]
—1. The statute 32 Hen. VIII. ch. 9, against buying disputed titles, is in force

in Upper Canada. *Beasley qui tam v. Cahill*, ii. U. C. R. 320.

Transfer of estate by disseisee while disseisor in possession.—2. A person disseised of land by another who is in possession, claiming the estate in opposition to him, cannot while he is so dispossessed transfer the estate by grant, or by bargain and sale. *Doe dem. Dunn v. McLean*, i. U. C. R. 151.

3. A deed made by a person out of possession of the land conveyed, where there are persons in possession claiming the fee of the land, is void, and passes no estate to the vendee. *Doe dem. McMillan v. Brock*, ii. U. C. R. 270.

Person possessed not setting up a conflicting title.—4. The true owner of an estate is not liable to the penalty under the statute 32 Hen. VIII. for selling a disputed title when the person in possession of the land is in privity with him, either as an overholding tenant, or a person let in on contract to purchase from him, and not setting up any conflicting title. *Benns qui tam v. Eddie*, ii. U. C. R. 286.

[Also case 14, *infra*.]

Applicable to terms for years.—5. *Semble*: That the Statute of Maintenance applies in this province as well to terms for years, as to estates in fee. *Doe dem. Clark v. McInnis*, vi. U. C. R. 28.

Conveyance by heir-at-law out of possession.—6. A. dies in 1830; after his death B., his wife, remains in the exclusive possession of the land until her second marriage with the defendant, and since then, they both continue in actual possession, the wife claiming to have a life estate under A.'s will.—C., the eldest son of the testator A. and B. his wife, while out of possession, assumes to convey the land and all his interest in it, as heir-at-law, to the lessor of the plaintiff: *Held*, that C.'s deed to the lessor of the

plaintiff was void, both at common law and under the Statute of Maintenance. *Ib.*

Buying an equity of redemption.—7. Buying an equity of redemption in a mortgaged property, of which the person selling has been out of possession for many years, is not buying a disputed title within 32 Hen. VIII. *McKenzie qui tam v. Miller*, Mich. Term, 6 Vic.

Priority in registry of deeds.—8. *Semble*: In registering titles a conveyance by deed registered after a prior conveyance by deed not registered, is not a purchase of a pretended title within 32 Hen. VIII. *Major qui tam v. Reynolds*, Hil. Term, 6 Vic.

Deed by party out of possession.—9. A deed of bargain and sale made by a party out of possession, while another person is in actual possession claiming the fee, is void, both at common law, and under the statute 32 Hen. VIII. ch. 9. *Doe dem. Moffat v. Scratch et al.*, v. U. C. R. 351, and *Doe dem. Simpson et al. v. Molloy et al.*, vi. U. C. R. 302.

Verbal bargains.—10. A mere verbal bargain for the sale of land will not subject a person to the penalty of the statute 32 Hen. VIII. ch. 9, for buying a pretended title. *Aubrey qui tam v. Smith*, vii. U. C. R. 213.

Conviction by party's own admission.—11. A person cannot be convicted under the statute of Hen. VIII. merely on his own admission that he has taken a deed from a party out of possession—some evidence aliunde must be adduced of the existence of such a deed. *Ib.*

Deed by a party out of possession.—12. Where at the time a deed of bargain and sale is made to A., B. is openly in actual possession of the land, using it as his own, nothing passes under the deed to A. *Doe dem. Bonter v. Savage*, v. U. C. R. 223.

Conveyance of land while boundary line in dispute.—13. *Held*, that while two persons are in difference about their boundary, and shew by their conduct that they are uncertain about the true line, but agree with each other to have it ascertained, and to hold accordingly, either party may make a conveyance to a third person, which will enable the alienee to hold according to the true boundary, though at the time of the conveyance there might be some of his land in possession of the other, in consequence of the line between them having been mistaken. (*Macaulay, J., dubitante*). *Doe dem. Beckett v. Nightingale, v. U. C. R. 518.*

Possession not adverse.—14. Where A., in possession, asserts a claim under and not by title independent of B., who makes a conveyance to C.—B.'s deed cannot be said to be bad, as made while A. was in adverse possession. *Doe dem. McKenzie et al. v. Fairman, vii. U. C. R. 411.*

Deed by heir, when party in possession claiming adversely.—15. Where there is an adverse possession of land, an heir-at-law, who has never entered, cannot make conveyance so as to enable his vendee to recover in ejectment. *Doe dem. Dixon v. Grant et al., iii. O. S. 511.*

16. A deed made by an heir-at-law while a third party is in possession, claiming adversely, is void. The heir-at-law must gain the possession before he can convey. *Doe dem. Peterson v. Cronk, v. U. C. R. 135.*

Facts to be shewn by vendor seeking benefit of the exception in the act—17. A vendor, in order to have the benefit of the exception under the statute 32 Hen. VIII. ch. 9, must really and in truth claim under some possession a year before the bargain made; a mere pretended fraudulent claim, under a person of whom in fact the vendor knew nothing, and with whom he had in truth no privity, will not

satisfy the statute. *Baldwin qui tam v. Henderson, iii. U. C. R. 297.*

Declaration.—18. Where a declaration in a *qui tam* action for a penalty under the statute 32 Hen. VIII. ch. 9, for buying a pretended title states the facts which gave a claim to the penalty, and then avers the right of the plaintiff to sue for and have the penalty for himself and Her Majesty, to which the defendant pleads *nil debet*: *Held*, that the declaration sufficiently avers, as a breach, the non-payment by the defendant of the penalty. *Held also*, that it is not necessary that the declaration should describe more particularly than it does the land bargained and sold—at least, after verdict. *Baldwin qui tam v. Henderson, iv. U. C. R. 361.*

Action on note—Plea, impeaching consideration as within the statute—19. To bring the giving of a note in payment of land within the statute 33 Hen. VIII. ch. 9, care must be had to charge enough to meet the provisions of the statute; where, therefore, the defendant merely averred that the plaintiff was not, for a year next before the bargain, "in receipt of the rents and profits," without saying that he was not "in possession of the land, or of the reversion or remainder thereof," *Held*, plea bad. *Nicolls v. Madhill, vi. U. C. R. 415.*

Entering verdict on one count, and abandoning the rest.—20. Where in an action on the Statute of Maintenance, a verdict was taken upon four counts of the declaration for the plaintiff, and the defendant moved to arrest the judgment, on the ground that some of the counts were bad, the Court allowed the plaintiff to enter the verdict upon one count of the declaration, abandoning the rest. *Beasley qui tam v. Cahill, ii. U. C. R. 320.*

Declaration.—21. In an action on the statute against the buyer of a disputed title the declaration will be bad,

in arrest of judgment, if it does not allege that the buyer knew that neither the seller, nor any of his ancestors, nor any person by whom the seller claimed the estate, had been in possession, &c., or received the rents, &c., one whole year next before the bargain made. *Ib.*

Action for penalties—Question for the jury.]—22. In debt for penalties, under 32 Hen. VIII. ch. 9, against the buyer of a disputed title, it must be distinctly left to the jury to say, not merely whether the right was a pretended right, but also, whether the buyer knew that neither the seller nor those under whom he claimed had been in possession of the land, or receipt of the rents and profits, for a year next before the sale. *Baldwin qui tam v. Henderson*, ii. U. C. R. 388.

[See stat. 14 & 15 Vic. ch. 7, sec. 5, which allows certain interests in land, and rights of entry, to be conveyed and disposed of.]

MALFEAZANCE.

See CASE (ACTION ON THE), 4.

MALICE (AVERMENT OF).

See CASE (ACTION ON THE), 8.

MALICIOUS ARREST.

See ACTION, 5.—ARREST, IV. 4.—COSTS, IV(1)—NEW TRIAL, VI. 4.—NON-SUIT, 13.

Debtor merely leaving the province.]—1. *Semble*: A creditor may arrest his debtor if he be going to leave the province, whatever may be the cause of absence, or however probable it may be that he will return. *Perrin v. Joyce*, Hil. Term, 5 Vic., upheld in *McBean et al. v. Campbell*, Hil. Term, 6 Vic.

Agent for creditor making the affidavit to arrest on a ca. sa.—His liability therefor.]—2. An agent of a

creditor making an affidavit upon which the debtor is arrested on a ca. sa., is liable to an action on the case for causing the writ to be sued out and to be indorsed and delivered to the sheriff, and the debtor to be arrested thereupon, though the jury expressly find, upon that being submitted to them, that the agent did nothing more than make the affidavit. *Davis v. Fortune*, vi. U. C. R. 281.

[See cases 7, 18, *infra*.]

Debt due two parties—Arrest by one—Liability of the other.]—3. Where a debt is due to A. & B., and A. makes an affidavit to arrest the debtor, B. is not liable to an action for a malicious arrest, unless it can be shewn that he participated in the malicious act, either of instructing or authorizing A. to do it, or by having some knowledge that it was done, or intended, or by having afterwards adopted it by giving his assent thereto. *Cameron v. Playter et al.*, iii. U. C. R. 138.

Proof of affidavit being made by defendant]—4. In an action for a malicious arrest, an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant. *Spafford v. Buchanan et al.*, iii. O. S. 391; and *Fitzgerald v. Webster*, Trin. Term, 2 & 3 Vic.

When case the proper action.]—5. Case will lie for maliciously swearing in an affidavit of debt “an apprehension that the plaintiff would leave the province,” if strong grounds be shewn to negative any cause for the existence of such an apprehension. *Dunn v. McDougall*, Trin. Term, 6 & 7 Wm. IV.

Averment of determination of former suit, and indorsement of ca. re.]

—6. In case for a malicious arrest, the determination of the suit is sufficiently averred by stating “the plaintiff recovered a certain sum for damages and costs, (under the provincial

statute 11 Geo. IV. ch. 5, allowing a verdict and judgment for a defendant in set-off,) and that the defendant was in mercy &c., without averring also, "that the defendant took nothing by his writ;" and an averment that the defendant maliciously obtained a judge's order to arrest the plaintiff, and issued a writ of *capias ad respondendum*, and indorsed it for bail, shews sufficiently that the writ was indorsed under the order. *Burnside v. Wilcox*, Trin. Term, 1 & 2 Vic.

What facts constitute agency.]—7. Where it was averred in the declaration against the defendant for a malicious arrest that by virtue of the affidavit of the defendant, he, the defendant maliciously caused a writ to be sued out for arresting the plaintiff, when he had no probable cause for believing that the plaintiff had made any fraudulent conveyance of his property, and that he further maliciously caused the writ to be indorsed and delivered to the sheriff &c.: *Held*, that these facts, if found by a jury, constituted in themselves the agency of the defendant for the plaintiff in the suit, and that the agency need not otherwise be more positively averred. *Davis v. Fortune*, vi. U. C. R. 597.

Averments, denying want of probable cause.]—8. Case for the malicious arrest of the plaintiff on a *ca. re.*: The plaintiff averred in his declaration "that the defendant, not having any reasonable cause for believing, and not believing that the plaintiff was then about to leave that part of the province of Canada formerly called Upper Canada, with intent and design to defraud the Bank of British North America, (the plaintiffs &c.) made oath &c., that he had good reason to believe, and did verily believe that the plaintiff was then immediately about to leave Upper Canada, with intent &c." *Held*, on motion for an arrest of judgment, because these averments did not deny the want of probable

cause for the arrest, and in such terms as the statute 8 Vic. ch. 48 makes necessary—declaration good. *Lyons v. Kelly*, vi. U. C. R. 278.

Rule for new trial on the evidence.] 9. In an action for a malicious arrest under a *ca. re.*, the plaintiff gave general evidence of his solvency &c.: no malice was proved on the part of the defendant; the defendant however gave no evidence to shew upon what ground he had arrested, and the jury found nominal damages of 16s. for the plaintiff—a rule was obtained for a new trial on the evidence, but under the circumstances, the Court discharged the rule. *Ib.*

On a ca. re.—Declaration setting out affidavit to arrest.]—10. In an action of trespass for an arrest under a *ca. re.*, against the plaintiff arresting, there is no necessity to set out in the declaration the affidavit to arrest. *Beamer v. Darling*, iv. U. C. R. 211.

On a ca. sa.—Declaration setting out the judgment.]—11. In an action for a malicious arrest on a *capias ad satisfaciendum*, it is not necessary to set out the judgment in the declaration. *Crawford v. Stennett*, Easter Term, 2 Vic.

Admissions under general issue.]—12. Upon the general issue, in an action for a malicious arrest, the writ is not admitted. *James v. Mill et al.* iv. U. C. R. 366.

Declaration—Averment of want of probable cause.]—13. In an action for a malicious arrest on *mesne process*, on the ground that the debtor was not going to leave the province, a declaration is good, in arrest of judgment, which states that the defendant made the arrest, "having no reasonable or probable cause to apprehend," instead of expressly negating the words of the statute, and alleging "that he did not apprehend" that the plaintiff would leave the province, &c. *Denham v. Ridout*, Mich. Term, 5 Vic.

On final process for fraudulent removal of goods—Defence.]—14.

Semble: In an action for a malicious arrest on a writ of *capias ad satisfaciendum*, on an affidavit "that the defendant had reason to believe that the plaintiff had parted with his property or made some secret or fraudulent conveyance thereof, to prevent its being taken in execution;" the defendant does not answer a *prima facie* case of want of probable cause, by shewing the sheriff's return of "*nulla bona*" to a writ of execution against the plaintiff's goods, which had been secreted or removed, or other circumstances from which a fraudulent assignment may be inferred. *Smith v. Chep*, Mich. Term, 5 Vic.

On final process—Averment of malice, &c.]—15. In an action on the case for a malicious arrest under a *ca. sa.*, it is sufficient for the plaintiff to aver in his declaration that the defendant maliciously sued out a *ca. sa.*, when he had no reason to believe that the plaintiff had made, &c. *McIntosh v. Demeray*, v. U. C. R. 343.

On final process—Question for the jury.]—16. In an action for a malicious arrest on a *capias ad satisfaciendum*, when there was no cause for believing that the plaintiff had made any secret or fraudulent conveyance of his property in order to prevent its being taken in execution, the question to be submitted is, not whether the assignment of the property really is fraudulent or not, but whether the defendant had reason to suspect that it was so. *Gunn v. McDonald*, vi. U. C. R. 596.

Proof of actual arrest.]—17. In an action for a malicious arrest, the arrest is not proved by shewing that the bailiff to whom the warrant was directed went to the plaintiff's house and told him at the door that he had a writ against him, but did not enter the house, nor touch him, and afterwards left him, on his promise to put in bail

the next day, which he did. *Perrin v. Joyce*, Hil. Term, 5 Vic.

Principal and agent—Arrest made by agent without principal's knowledge.]—18. An action for a malicious arrest cannot be maintained against a principal on an arrest made by his agent's affidavit of his own apprehension that the debtor would leave the province, the affidavit and arrest both being made without the principal's knowledge, privity or procurement. *Smith v. Thompson*, Easter Term, 5 Vic.

Averment negating debtor's leaving the province, &c.]—19. Where in an action for a malicious arrest on *mesne process* the plaintiff declared that the defendant, not being apprehensive that he would leave the province without satisfying the debt for which he caused him to be arrested, falsely and maliciously made an affidavit that he was so apprehensive, and caused the plaintiff to be arrested &c.; the declaration was held bad in arrest of judgment, on the ground that the inducement and averment were too large, as it was not necessary that the creditor should be apprehensive that the debtor would leave the province of Canada to justify him in making the affidavit and arrest. *Thompson v. Garrison*, Easter Term, 5 Vic.

20. The same objection being taken as in the last case: *Held*, to be a good ground of non-suit. *McBean et al. v. Campbell*, Mich. Term, 6 Vic.

Omissions which render declaration bad.]—21. In the third count of a declaration in case for a malicious arrest the plaintiff charged the defendant with maliciously causing the writ to be indorsed for a larger sum than warranted by the judgment, but he did not aver a want of probable cause for indorsing the writ for the amount mentioned, nor did he lay any precise day on which the arrest was made, nor did he aver that the defendant maliciously caused the plaintiff to be arrested:

Held, declaration bad upon all these grounds. *Ackland v. Adams*, vii. U. C. R. 139.

Prima facie case—Exemplification of former judgment.]—22. In an action for a malicious arrest without any probable cause of action it is not sufficient to establish a prima facie case that the plaintiff put in at the trial an exemplification of the judgment in the former case, by which it appears that a verdict was rendered for the defendant in that action. *Sherwood v. O'Reilly*, iii. U. C. R. 4.

Determining the probable cause &c.]—23. In an action for a malicious arrest the question of probable cause is for the decision of the Court, which may be at once given upon the point if there be no dispute upon the facts; but if the statements are contradictory the Court should still determine the probable cause, directing the jury that there was or was not probable cause according to their finding of one or other state of facts before them. *Manners v. Boulton*, Mich. Term, 7 Vic.

MALICIOUS PROSECUTION.

Want of probable cause must be proved.]—1. In an action for a malicious prosecution, it is not sufficient for the plaintiff to shew the prosecution and its abandonment, to go to the jury; he must also shew want of probable cause. *Lapointe v. Stennett*, Trin. Term, 1 & 2 Vic.

Variance in statement of court where indictment tried.—Amendment.]—2. Where in an action on the case for a malicious prosecution it was alleged in the declaration that the trial of the indictment took place before a Court of Oyer and Terminer, and the indictment was at General Gaol Delivery: *Held*, that the variance was amendable, and that the trial of the indictment being through a Queen's counsel did not deprive the

plaintiff of the right of action against the real prosecutor. *Carr v. Proudfoot*, Easter Term, 3 Vic.

Evidence—Record of acquittal.]—3. If in an action for a malicious prosecution, the record of the acquittal of the plaintiff is produced at Nisi Prius, the Court cannot inquire into the circumstances under which it has been brought forward; but it must be received in evidence, although no order was ever granted for the delivery of a copy of the indictment to the plaintiff. *Lusty v. Magrath*, Easter Term, 5 Vic.

Proof of probable cause.]—4. Where in an action for a malicious prosecution for arson it was shewn that the defendant received information through the office of the governor's secretary that certain persons confined in the Provincial Penitentiary could give information on the subject of the burning, and the defendant went accordingly to the Provincial Penitentiary and then received the written statement of those persons that the plaintiff had committed the arson: *Held*, that if he acted bona fide on this representation, that it formed a sufficient justification. *Oswald v. Meuburn*, Mich. Term, 6 Vic.

MANDAMUS.

See APPEAL, 6.—BANK OF UPPER CANADA, 2.—COMMON SCHOOLS, 7. DEED, III. 9.—DISTRICT COUNCIL, 12.

General principle as to issuing.]—1. A mandamus never issues except to admit or restore some person to an ascertained right. *Barnhart v. Justices of the Home District*, Easter Term, 7 Wm. IV.

Mandamus refused, parties applying having no particular interest in the application.]—2. Upon an application by two members of the Municipal Council of the District of Gore

for a mandamus to the warden, commanding him to repay to the treasurer of the district a sum of money he had received from the council as a salary for his services as warden: *Held*, that the mandamus must be refused, the parties applying having no particular interest in the matter. *Regina v. The District Council of the District of Gore*, v. U. C. R. 357.

Not issuable for Parliamentary wages.—3. The Court refused to issue a mandamus to justices of a district to order parliamentary wages to be paid to the representative of a town under the provincial statute. *Rex v. The Magistrates of Niagara*, Tay. U. C. R. 542.

[See *Cornwall v. Baby*, 14, *infra*.]

To municipal corporations for the trial of contested elections.—4. The Court will, if circumstances require it, issue a mandamus to a municipal corporation to compel them to proceed in the trial of a contested election. *Denham and the Corporation of the City of Toronto*, *In re*, iii. O. S. 605.

To try legality of election of corporate officers.—5. The Court will not grant a mandamus to try the legality of the election of corporate officers, but will leave the parties complaining to an information in the nature of a quo warranto. *Electors of Board of Police of Brockville*, *In re*, iii. O. S. 173.

When granted to a bank for the inspection of their books.—6. The Court will not, although they have the power, grant a mandamus for the inspection of the stock book, or other books of a bank, unless some special grounds be disclosed to warrant it. *Bank of Upper Canada*, *In re*, Dra. Rep. 57.

To clerk of the Court of Requests for the production of books.—7. A mandamus was granted against the clerk of a court of requests, to give up the books and papers of the court,

which he had refused to do, on being removed from office. *Lacroix*, *In re*, Mich. Term, 6 Wm. IV.

To Quarter Sessions, ordering them to adhere to their decision in a case.]

—8. Where a person had been convicted before justices of the peace and fined, and on an appeal to the Quarter Sessions, the justices there admitted more evidence than had been heard on the conviction, and the accused party was acquitted, but on receiving the opinion of the Attorney General that the additional evidence should not have been admitted, the justices in sessions confirmed the conviction, and ordered it to be recorded, but took no notice of the acquittal—the Court made absolute a rule for a mandamus, commanding them to enter an acquittal. *Rex v. Justices of Bathurst*, Mich. Term, 6 Wm. IV.

To sheriff, for non-conveyance of land sold for taxes.—9. Where lands were sold under the assessment law for the non-payment of taxes, on the 1st of March 1830, and on the 1st of March 1831 the owner of the land paid the amount of the purchase money and twenty per cent. besides, as required by the statute, to the deputy sheriff, who collected taxes for the treasurer of the district who was then absent, and a short time afterwards the purchaser at the sale demanded a deed of the land from the sheriff, who refused to give it—the Court refused a mandamus to compel him, stating that the owner was in time, and if he were not, they would not interfere summarily, but would leave the purchaser to his action. *Sheriff of Newcastle District*, *In re*, Dra. Rep. 515.

To boundary commissioners.—10. A rule for a mandamus will be granted against boundary line commissioners, if they do not return the proceedings had before them within fourteen days after notice of appeal. *Delong et al. v. Striker et al.*, Easter Term, 3 Vic.

To Quarter Sessions, ordering them to authorize payment for certain printing.]—11. A rule for a mandamus will not be granted to order the justices in sessions to direct the treasurer of a district to pay the balance of an account for printing for the district, which had been rejected by them as excessive. *Stanton v. Justices of the Home District*, Easter Term, 3 Vic.

Return to, by justices of the peace.]—12. Upon a mandamus nisi to justices of the peace, they should return the recorded proceedings had before them, and not collateral matter not embraced in the entries of the court. *Rex v. Justices of the Home District*, Trin. Term, 11 Geo. IV.

To a member of a corporation individually—Return disputing name of corporation.]—13. It is no return to a mandamus to A., a member of the Board of Police of London, that the President and Board of Police of London is the corporate name, and that there is no such name as the corporation of the Town of London—the writ having been directed to him by name, describing him as a member of such corporation. The Court will not, on a suggestion that the return to a writ of mandamus was not actually made as it purports to be made, treat it as a nullity: it must be expressly shewn that it was unauthorized, to enable them to do so. *Regina v. Balkwell*, Hil. Term, 5 Vic.

To district treasurer, for payment of parliamentary wages.]—14. The Court refused to grant a mandamus to a district treasurer to pay over to a member of the House of Assembly of Upper Canada his wages, for which he had obtained the Speaker's warrant, under 1 Vic. ch. 17, it not being shewn that the money had been raised by assessment, or that any applications had been made to the magistrates in session to direct that the payment should be made. *Cornwall v. Baby*, Hil Term, 5 Vic.

To warden of a district, to swear in a newly elected councillor.]—15. Where a mandamus was applied for, to be directed to the Warden of the London District, to swear in a person who claimed to be duly elected a Councillor, under the Municipal Council Act, the Court discharged the rule, it appearing that a Councillor had been returned and sworn in for the township, which had been contested; the proper remedy in such case being by quo warranto. *Brennan, In re*, Easter Term, 5 Vic.

Disputed boundary between two districts—Refusal by one to appoint an agent—Mandamus.]—16. Where there is a disputed boundary between two districts, and one of the districts appoints an agent for settling the boundary, under the act 1 Vic. ch. 19, sec. 3, the Court will not, on the refusal of the justices of the Quarter Sessions of the other district to appoint an agent on their behalf, direct a mandamus to them to do so, as the act leaves it discretionary with them to proceed or not. *Boundary line between Eastern and Johnstown Districts, In re*, Mich. Term, 6 Vic.

To District Council, ordering them to build a Court House.]—17. The Court refused a rule nisi for a mandamus, at the instance of the justices of the Huron District, to compel the Huron District Council to build a Court House. *Justices of the District of Huron v. Huron District Council*, v. U. C. R. 574.

To justices of the peace, ordering them to issue execution on a conviction.]—18. The Court refused to grant a mandamus, to compel two justices of the peace to issue execution upon a conviction, under 6 Wm. IV. ch. 4, sec. 2, for selling spirituous liquors without license, the conviction having been grounded upon the written statement of the informer, and the oath of one other witness; there being a doubt,

under the statute, whether the information ought not also to be an oath. *Regina v. McConnell*, Hil. Term, 7 Vic.

To district treasurer, ordering payment of fees to the clerk of the peace—Return.—19. Where the treasurer of the district council refuses to pay the account of the clerk of the peace for certain services, and returns to a writ of mandamus nisi that such charges are not shewn by the clerk of the peace to be connected with the administration of justice, or to have been specifically provided for by law, so as to render it necessary that they should be audited by the district council; and returns further, that there were no funds in his hands out of which he could pay those charges—the return was allowed. *Clerk of the Peace v. Western District Municipal Council, In re*, i. U. C. R. 162.

To district treasurer, ordering payment of sheriff's fees.—20. A mandamus to the treasurer of a district to pay the sheriff's account, audited by the justices of the peace of his district in quarter sessions, was refused by the Court, and the sheriff was left to his remedy against the treasurer by indictment, for breach of duty. *Hamilton v. Harris, Treasurer of London District, In re*, i. U. C. R. 513.

To commissioners of St. Lawrence Canal, for appointment of an arbitrator.—21. A mandamus nisi was awarded to the commissioners of the St. Lawrence Canal, to appoint an arbitrator to join in awarding upon an unsettled claim. *McNairn and Commissioners for the St. Lawrence Canal, In re*, iii. U. C. R. 153.

To Board of Police of Niagara, ordering payment of licenses over to inspector of licenses—22. A mandamus was granted, directing the Board of Police of Niagara to pay over to the inspector of licenses the sum of 240*l.*, received by the clerk of the board for

tavern licenses for 1846 and 1847; the Court deciding that, under the 17th sec. of 8 Vic. ch. 62, and 3rd and 4th secs. of 8 Vic. ch. 72, the government, and not the Town of Niagara, were entitled to receive the the dues upon such licenses. *Regina v. The Board of Police of Niagara, iv. U. C. R. 141.*

To county court.—23. The Court will only grant a mandamus to the judge of the county court, in cases where there is no doubt of his jurisdiction. *Trainor v. Holcombe*, vii. U. C. R. 548.

To district court judge, ordering him to admit an attorney to practise in his court.—24. Per Macaulay, J., and Jones, J.—Attornies of this court not being barristers, cannot as of right be heard as advocates in the district courts. Robinson, C. J., dissentiente. The Court, thus differing in opinion as to the right of attornies to practise as advocates in district courts, refused a mandamus to a judge of one of the district courts to admit an attorney to be heard therein as an advocate. *Le-penotiere, In re*, iv. U. C. R. 492.

Quashing mandamus nisi for inconsistency before return filed.—25. A mandamus nisi, issued upon a rule obtained for that purpose, must be consistent with and authorized by the rule; otherwise it may be quashed on motion before the return to the mandamus nisi is filed. *Regina v. McLean, v. U. C. R. 473.*

MARINE POLICY OF INSURANCE.

See INSURANCE, 5, 7, 8, 9, 10.—NEW TRIAL, I. 17.

MARINE RAILWAY COMPANY.
See KINGSTON MARINE RAILWAY COMPANY.

MARKET OVERT.

See HORSE.

MARRIAGE.

See CRIMINAL CONVERSATION. —
DOWER, II. 6.—EJECTMENT, II. 11.
EVIDENCE, II. 7.

Effect of Imperial Statute 5 & 6 Vic. ch. 26 on certain illegal marriages.]—1. Marriages contracted in Ireland between members of the Church of England and Presbyterians, celebrated by ministers not belonging to the church of England, are legalized by the imperial statute 5 & 6 Vic. ch. 26; and such marriages celebrated before that act was passed, are legal marriages in this country. *Doe dem. Breakey v. Breakey*, ii. U. C. R. 349.

Evidence of legal marriage against the evidence of cohabitation and reputation.]—2. The certificate of marriage by a magistrate in the following form; "I do hereby certify that I have this day married A. and B. according to the Church of England," dated in 1801, with proof of cohabitation and reputation, but without proof of publication of banns: *Held*, sufficient to establish the marriage against the evidence of cohabitation and reputation of marriage with another person alive at the time of the second marriage, defects of form in such cases being cured by 11 Geo. IV. ch. 36. *Doe dem. Wheeler v. McWilliams*, ii. U. C. R. 77.

3. Where a marriage in fact has been proved, evidence of reputation and cohabitation is not sufficient to establish a prior marriage. *Doe dem. Wheeler v. McWilliams*, iii. U. C. R. 165.

MARRIAGE (BREACH OF PROMISE).

See ARREST OF JUDGMENT, 7.—
COSTS, I(1), 8.

MARRIED WOMEN.

See ABATEMENT, 5.—ADMINISTRATION BOND, 4.—CRIMINAL CONVERSATION.—DEED, II. 4, 5, 6, 7, 8, 9, 10.—EJECTMENT, II. 11.—HUSBAND AND WIFE.—LOWER CANADA.

MASTER AND SERVANT.

See ASSAULT AND BATTERY, 7.—
ASSUMPSIT, I. 13.—CORPORATION,
7, 8.—HUSBAND AND WIFE, 4.—
LIMITATIONS (STATUTE OF), II. 14.
MAGISTRATES, 9.—SEDUCTION, 8.

Yearly hiring—Action for wages on wrongful dismissal—Declaration.]

—1. A declaration setting out a contract to pay a certain sum per year for services as long as a party should remain in such service, and a readiness and willingness to continue, will not entitle a party to recover for a wrongful dismissal, unless the declaration plainly and directly allege that the defendant did agree to retain the plaintiff in his service for the period within which he is stated to have been dismissed. *Raines v. The Credit Harbor Company*, i. U. C. R. 174.

Child against parent.]—2. Unless a specific contract of hiring be proved, the Court will discountenance the bringing an action by a son or daughter against a parent for services performed while living in the parent's house. *Sprague et ux. v. Nickerson*, i. U. C. R. 284.

Servant impounding cattle—Master liable for his acts.]—3. A master is liable for the acts of his farm servant in impounding cattle in his absence, the servant acting within the general scope of his authority. *Spafford v. Hubble*, Easter Term, 7 Wm. IV.

Yearly hiring—Wrongful dismissal—Action for wages before expiration of the year.]—4. A clerk or servant who is engaged on a yearly

hiring, cannot, on being dismissed without sufficient cause, recover the amount of his year's wages in an action on the common counts commenced before the expiration of the year; and this, although the hiring was for one year at a certain sum per month. *McGuffin v. Cayley*, ii. U. C. R. 308.

Declaration against servant for breach of duty.]—5. Where in special assumpsit against the defendant on an agreement to serve the plaintiffs faithfully, and the plaintiffs assigned as a breach that during the time of service the defendant wrongfully behaved himself in a careless and negligent manner while in the service of the plaintiffs, the breach was held bad on special demurrer. *O'Neill et al. v. Leight*, ii. U. C. R. 204.

MATERIALTY IN PLEADING.

See PLEADING, VIII.

MEMBER OF PARLIAMENT.

See PARLIAMENT, 2, et seq.

MEMORIALS.

See EVIDENCE, II. 5, 9, 10.—MORTGAGE, 14.

MERGER.

See BILLS OF EXCHANGE ETC., VII. 8, 9.

MESNE PROCESS.

See ABSCONDING DEBTOR, 6.—ARREST, II. 6, 13.—CAPIAS AD RESPONDENDUM.—DISTRINGAS.—ESCAPE, 15, 19.—FALSE IMPRISONMENT, 2, 3, 4.—LIMITS, I. 2.—PROCESS.

MESNE PROFITS.

See ATTORNEY, II(1), 6.—VARIANCE, 4.

Averment of land being plaintiffs'.]

—1. It is necessary, in a declaration in trespass for mesne profits, to state that the land was the land of the plaintiffs; such omission is not cured by stating their expulsion. *Grant et al. v. Fanning*, Tay. U. C. R. 470.

Improvements in mitigation of damages.]—2. In trespass for mesne profits, the defendant may give in evidence in mitigation of damages the value of buildings erected on the premises by him. *Lindsay et al. v. McFarling*, Dra. Rep. 6.

3. In an action for mesne profits the jury gave a verdict for nominal damages, and the Court were moved by the plaintiff to set aside the verdict as perverse and contrary to law. Evidence was given at the trial that the defendant had made substantial improvements on the lot from which he had been ejected, and there was also evidence of the costs of the ejectment suits; but held, that the damages were in the discretion of the jury, and that the damages and costs of the ejectment might be considered as paid for by the improvements, and the rule was discharged. *Patterson v. Reardon*, vii. U. C. R. 326.

Action against executrix of sheriff—Plea amounting to general issue.]

—4. In trespass for mesne profits against the executrix of a sheriff, a plea justifying the entrance on and seizure of the property under an attachment directed to the testator under the Absconding Debtors' Act against the estate, real and personal, of a stranger, was held bad on special demurrer, as amounting to the general issue. *Green v. Hamilton*, Hil. Term. 3 Vic.

Action against an executrix—Defence of writ not being executed till after testator's death.]—5. An action for mesne profits may be maintained against an executrix under 7 Wm. IV.

ch. 3; and where the action is founded on the judgment against the casual ejector in ejectment, it is no ground of defence that although the writ of possession is tested in the tenant's life-time, it was issued and executed after his death without a scire facias. *Green v. Hamilton*, Easter Term, 3 Vic.

Action—Evidence of judgment in ejectment.—6. Whereafter a recovery in ejectment an action is brought for the mesne profits, and evidence of title is given, it is not necessary to shew the judgment in ejectment. *Stevenson v. M'Combs*, Mich. Term, 4 Vic.

Action, after judgment by default in ejectment.—7. In an action for mesne profits, after judgment by default in ejectment, it is not necessary that the costs of the ejectment should be taxed before they can be recovered. *Bank of Upper Canada v. Armstrong*, Hil. Term, 6 Vic.

Defendant not estopped by judgment against casual ejector from disputing title.—8. A judgment in ejectment against the casual ejector does not estop a defendant, in an action for mesne profits, from disputing the title of the plaintiff from the time of the demise laid in the action of ejectment. *Ponton v. Daly*, i. U. C. R. 187.

[See the new Ejectment Act, 14 & 15 Vic. ch. 114.]

METHODIST TRUSTEES.

See EJECTMENT, IV(2), 6.—RELIGIOUS SOCIETIES.

MIDLAND DISTRICT TURNPIKE TRUST.

Action under 3 Vic. ch. 53—Pleadings.—1. In an action brought by the Commissioners of the Midland District Turnpike Trust under 3 Vic. ch. 53; it must appear upon the face of the declaration that the demand accrued to the commissioners in the course of

their business as commissioners. *Cumming v. Guess et al.* ii. U. C. R. 125.

Limited power to demise—Demise beyond that power—Note for rent—Extension of time.—2. Commissioners appointed under an act of parliament limiting their powers with respect to demises and to the collection and appropriation of rent when due, make a demise beyond this scope; the tenant is put into possession and enjoys his term; the commissioners, at the expiration of the term, take a promissory note from the tenant for the amount of rent: *Held*, that the commissioners, by their clerk, could not sustain an action upon such note, on two grounds—first, because the promise to pay the note arose upon an illegal consideration, viz., the illegal demise; and secondly, because the commissioners had no power, though the demise were legal, to give time for payment of rent already due (*Robinson, C. J.*, dissentiente upon both grounds). *Ireland v. Guess et al.*, iii. U. C. R. 220.

Lease different from provisions in the act.—3. A. sues as clerk to commissioners exercising a public trust under an act of parliament (3 Vic. ch. 53) upon an illegal demise of tolls for a year, at a rent payable *every fortnight in advance*, the 27th section of that act requiring the rent to be made payable *monthly*; the lease stated in the declaration is said to be subject to the provisions in the act: *Held*, on demurrer to the declaration, that the plaintiff, as clerk to the commissioners, could not be permitted to recover on such a contract, because it is a contract substantially different from the one which the commissioners are expressly directed by the statute to make. *Ireland v. Noble*, iii. U. C. R. 235.

MILEAGE.

See POUNDAGE ETC., 6.

MILLER.

See ASSUMPSIT, II. 5.

MILLS.

See ARBITRATION AND AWARD, IV (3), 1, 2.—CASE (ACTION ON THE), 9.—EASEMENT, 3, 4, 5, 6.—WATER 2, 3.

MISDIRECTION (OF JUDGE).

See ATTORNEY, II(1), 9.—AUCTION, 2.—CARRIER, 13.—NEW TRIAL, VI.

MISJOINDER.

See ACTION, 6.—DEMURRAGE, 2.—DEMURRERS, 13, 15.—PLEADING, X.

MISNOMER.

See ARREST, I. 17.—COSTS, IV(1), 11.—EJECTMENT, II. 8.—JUDGMENT OF NON PROS, 3.—PRACTICE, I. 24; II. 15.—VARIANCE, 9, 12, 14.

How taken advantage of.]—It is no ground of non-suit that the plaintiff has declared by a name different from her real name; it can only be taken advantage of by an application to amend the declaration. *Murphy v. Bunt et al.*, ii. U. C. R. 284.

MISREPRESENTATION.

See CONTRACT, 3.—INSURANCE, 3, 8. LIMITATIONS (STATUTE OF), III. 2. SHERIFF, IV. 5.

MISSPELLING.

See ARREST, I. 32.—IDEM SONANS.

MOLLITER MANUS IMPOSUIT.

See ASSAULT AND BATTERY, 1, 4.

MONEY HAD AND RECEIVED.

See BANKRUPT ETC., 8.—COMMON COUNTS, 3.—CONTRACT, 14.—CORPORATION, 3, 6.—DIVISION COURT, 4.—GAMING. 1, 2.—INFANT, 2.—JOINT STOCK COMPANY, 4.—PARTNERS ETC., 13.—SET-OFF, 15.—SHERIFF, III. 9; V. 12.

Agreement by testator to purchase lands—Recovery of money on failure of agreement.]—1. Where money had been paid by a testator on an agreement for the purchase of lands, which the vendor had failed to complete, the money may be recovered back by the executors as money had and received to the use of the testator. *Smart et al. v. Brown*, Easter Term, 2 Vic.

May be maintained for money levied on an execution.]—2. An action for money had and received may be maintained against a sheriff, for money levied on an execution. *Shuter et al. v. Leonard*, iii. O. S. 314.

Assignment of judgment for joint benefit of assignee and plaintiff—Recovery of plaintiff's share.]—3. Where a judgment was assigned to the defendant for the joint benefit of the plaintiff and himself, and he received the whole amount of it: *Held*, that the plaintiff could recover his share as money had and received. *Hooker et al. v. M' Millan*, iv. O. S. 14.

Lease of farm on shares—Recovery of lessor's share.]—4. Where the plaintiff let to the defendants a farm on shares by an instrument under seal, and the defendants covenanted to deliver to him a portion of the crop by a certain day, but before that day sold the crop and applied the money to their own use: *Held*, that the plaintiff could not rescind the contract and sue for his proportion as money had and received. *Ducat v. Sweeney et al.*, Mich. Term, 3 Vic.

Illegal interest on loan—Plaintiff may recover the excess.]—5. A plaintiff who has paid more than the legal

interest for money loaned to him may maintain an action for money had and received against the lender, to recover back the excess of interest over the legal rate. *Barnhart v. Robertson*, Trin. Term, 7 Vic.

Construction of words "value received"—Evidence.—6. The words "value received" in an agreement to the following effect—"I promise to pay A. or bearer 25*l.* value received, to be paid in merchantable wheat at market price"—import a debt due, and are prima facie evidence of a consideration; and such an agreement may be shewn under the counts for money had and received, and the account stated. *Waddel v. McCabe*, iii. O. S. 502.

Agreement void under Statute of Frauds—Recovery of money paid thereon.—7. If a party pay money on a verbal agreement for the sale of lands, he cannot, without shewing something more, maintain an action to recover it back, on the ground that the agreement is void by the Statute of Frauds. *Barber v. Armstrong*, Trin. Term, 7 Vic.

Agreement to be accountable for the amount of a note deposited, if paid—Action not maintainable if not paid.—8. A. leaves with B. the following receipt—"Mr. John L'Esperance has left with me a note signed by J. G. Tremaine for 97*l.*, payable at the Bank of Montreal here, at three months from the 31st ultimo, which I am to account to him for *if paid*, deducting the amount he owes me.—Cobourg, April 1st 1846, (signed), Benjamin Clarke."—A. indorses the note and gets it discounted at a Bank.—When it becomes due the note is renewed with B.'s assent, who indorses the same.—Before the renewal becomes due, B. sues A. for money had and received: *Held*, that under these facts the action would not lie. *L'Esperance v. Clark*, iv. U. C. R. 12.

Cheque lost in transmission to a bank—Who liable for such loss.—

9. Where the plaintiff's agent had paid into the agency of the Gore Bank at Simcoe a sum of money, partly in cash, and partly by cheque on the Commercial Bank at Toronto, to be placed to the credit of the plaintiff with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of a quarter per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank, or credited to the plaintiff—it was held that the plaintiff could not maintain an action against the Gore Bank for the amount of the cheque as so much money had and received to his use. *Todd v. The Gore Bank*, i. U. C. R. 40.

Money paid by a bank to a wrong person recoverable from the bank by party entitled to it.—10. The Bank of British North America in England received money there to be transmitted to A. in Upper Canada, and sent a letter of credit by post to A. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post-office in Canada (A. having in the meantime died), and A.'s name forged on the letter of credit, and the money received by some person unknown. *Held*, that A.'s executrix was entitled to recover the money from the branch at Toronto as money had and received to A.'s use. *Gissing et ux. v. Hopper*, Easter Term, 7 Vic.

Promise to pay debt of another—4th section of the Statute of Frauds.—

11. Where the plaintiff had been employed by A. in getting out timber, which A. afterwards sold to the defendant, who agreed verbally with the plaintiff and others who had been working with him—the timber being in their possession—that he would pay the wages of the plaintiff and others if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there: *Held*, that on shewing the

sale there, the plaintiff was entitled to recover for his wages as money had and received, and that the case was not within the Statute of Frauds. *McDonell v. Cook*, i. U. C. R. 542.

Taxes paid to one treasurer for transmission to another—Neglect—Taxes paid a second time under protest—Recovery.—12. Where taxes were paid to the treasurer of the Home district on lands situate in the Ottawa district, for the purpose of their being transmitted to the treasurer of the latter district, and the treasurer of the Home district not having so transmitted the amount, the lands were duly advertised for sale, and the plaintiff, in order to save the lands, paid the taxes to the treasurer of the Ottawa district under protest: *Held*, that he could not maintain an action for money had and received against him to recover them back. *Baldwin v. Johnson*, ii. U. C. R. 475.

Action against an attorney, evidence of judgment being fraudulently obtained.—13. In an action for money had and received against an attorney, evidence that the judgment under which the money was collected was fraudulently confessed was held not admissible. *Williams v. King*, Dra. Rep. 452.

For money paid on an agreement void, as made on Sunday.—14. Where A. had received money on an agreement to deliver timber to B. and afterwards refused to deliver the timber, and was sued by B. to recover the money back, it is no defence to such an action to shew the agreement made on a Sunday, and therefore void under the act 8 Vic. ch. 45; for if void, that would be no reason why the money received under it should not be refunded. *Vail v. Duggan et al.*, vii. U. C. R. 568.

MONEY LENT.

See ARREST, I. 14, 20, 25.

Cheque, no evidence of—The production of a cheque is not even prima facie evidence of money lent by the drawer. *Foster v. Fraser*, Mich. Term, 4 Vic.

[In declaring for money lent, it is not necessary to aver that the money was lent at the defendant's request. *Victors v. Davis*, xii. M. & W. 758.]

MONEY PAID.

See ARREST, I. 13, 20.—BILLS OF EXCHANGE, VIII. 2. 5.—EXECUTOR ETC., I. 6.—GOODS SOLD, 5.—PARTNERS ETC., 7.

Sale of land—Transfer of right thereto through several parties—Loss of right of action by the original vendor against the original vendee.—1. Where A. sold land to B. for 225*l.*, and B. sold it to C. for the same sum, and C. sold it to D., and it was agreed between A., C. and D. that D. should pay A., who thereupon discharged B., who discharged C., and A. agreed to take from D. land in payment of 200*l.* of the purchase money, and took D.'s promissory note for 25*l.* the residue; but having subsequently borrowed 95*l.* of D., instead of receiving at once a deed of the land in payment of the 200*l.*, he took a bond that a deed should be made to him on the re-payment of the 95*l.* by instalments; but having made default in the payment of these, he abandoned the bond and note given by D., and brought an action against B. for the 225*l.*, as money paid to his use: *Held*, that the action could not be maintained, A. having lost his remedy on D.'s bond through his own default, and therefore having no right to make B. pay the money. *Holmes v. Spencer*, iii. O. S. 161.

Recovery of costs by a party indemnified.—2. An action for money paid will not lie against a person who has engaged to indemnify another against the costs of an action brought against

him for the amount of those costs after they have been paid by the party indemnified; the action should be special on the indemnity. *Miller v. Munro*, Mich. Term, 5 Vic.

Recovery of costs paid by a party defending a suit for another.—3. A. releases B. from gaol by undertaking to pay C. the debt B. owed him. C. sues B. upon this undertaking and recovers.—B. requests A. to defend the suit in order to gain time: *Held*, that A. could recover from B. the costs of this suit on the common count for money paid to his use. *Smith v. Davidson*, iv. U. C. R. 191.

Action by a warehouseman against a person who, through mistake, had taken goods from his warehouse.—4. A., a wharfinger and warehouseman, receives a hogshead of sugar to be stored in his warehouse. It belonged to B., but through mistake it was delivered by A.'s servant to C., who came and claimed it as his.—B. hearing of it, convinces A. that he has made a mistake in delivering it to C., and A. pays B. the price of the sugar and brings his action on the common count for money paid against C.—A. recovers. *Held*, on motion for a new trial that A. on these facts need not declare specially, but could recover against C. on the common count for money paid. *Kitson v. Short*, iv. U. C. R. 220.

Averment of request.—5. In declaring on the common count for money paid, it must be averred that the money was paid by the plaintiff to the defendant at his request. *Aikin v. Howcutt*, vii. U. C. R. 143.

MONUMENTS.

Survey — Evidence of original posts.—A surveyor cannot act independently of the provisions of the statute 58 Geo. III. ch. 13, and arbitrarily lay on one side the evidence which neighbors are ready to give from their own knowledge of the situ-

ation of original posts. *Sherwood v. Moore*, iii. U. C. R. 468.

MORTGAGE.

See ARREST OF JUDGMENT, 2.—BANK OF UPPER CANADA, 3, 4.—COVENANT, II(1), 2, 3; II(2), 7, 17, 18. DEBT, 2.—DISTRESS, I. 16.—DOWER, II. 2.—EJECTMENT, I. 3; VIII. 12, 13, 23.—ESTOPPEL, 4.—EXECUTION, 11, 12.—FRAUDULENT DEEDS ETC., 15.—JOINT TENANCY, 1.—LIMITATIONS (STATUTE OF), II. 27, et seq.—MAINTENANCE, (STATUTE OF), 7.—NEW TRIAL, X. 15. PARTNERS ETC., 15.—SHIP REGISTRY ACT, 1.—SUNDAY, 3, 4.—USURY, 2, 9.—WITNESS, 9.

Purchase of land at sheriff's sale on an execution subsequent to a mortgage.—1. A purchaser at sheriff's sale of lands, sold under a judgment and execution subsequent to a mortgage in fee by the debtor, cannot recover against the mortgagee in possession. *Doe dem. Richardson v. Dickson*, ii. O. S. 292.

Stay of proceedings on payment of debt, interest and costs.—2. Where A. gave an absolute conveyance of land to B., to secure a sum of money lent by him to A., and B. gave a bond for its re-conveyance, on the payment of the money lent, on a certain day; on ejectment brought by B. after a lapse of eight years, the Court ordered that proceedings should be stayed on payment of the principal, interest and costs, and refused to allow the plaintiff to include a simple contract debt incurred on the security of the bond, because there was no writing respecting it, and the statute 7 Geo. II. ch. 20, under which the proceedings were stayed, did not extend to it. *Doe dem. Shuter et al. v. McLean*, iv. O. S. 1.

[See cases 6 and 11, *infra*.]

Mortgage for larger sum than advanced—Rights of assignee without



notica.—3. Where the instalments on a mortgage were for a larger sum than was advanced, and the mortgagee on discovering the mistake, gave an undertaking in a separate paper, not under seal, that only the correct sum should be demanded, and afterwards assigned the mortgage, and the assignee brought covenant against the mortgagor for non-payment of the instalments as set out in the mortgage—the Court refused to stay proceedings on payment of the sum really due. *Baby v. Milne*, Hil. Term, 6 Wm. IV.

[Also, see case 11, *infra*.]

Presumption of re-conveyance when mortgage in fact satisfied.—4. Lands were mortgaged, and at the time for redemption, by agreement between the mortgagor and mortgagee, the money was paid by a conveyance of the land to a stranger, but the mortgage was not given up, nor was there a re-conveyance, and some years afterwards the mortgagee conveyed the land in fee to another: *Held*, that the grantee of the mortgagor must recover, and if necessary, a re-conveyance would be presumed from the mortgagee. *Doe dem. McLean v. Whitesides*, Easter Term, 6 Wm. IV.

Ejectment by a second mortgagee against a purchaser from first mortgagee.—5. Where A. made a mortgage of his property to two persons at different times, and died after the time for payment in the first mortgage, without having redeemed either, and the first mortgagee having taken possession sold to A.'s heir for a valuable consideration, who entered into possession and died, leaving B. his heir, who was also A.'s heir: *Held*, that the second mortgagee, having a mortgage of the equity of redemption only, could not bring an ejectment against B., who was in by purchase, and not by descent, and was therefore not estopped by A.'s deed. *Doe dem. Gillespie v. Macaulay*, Hil. Term, 7 Wm. IV.

Bond to convey land on payment of a certain sum, not construed as a mort-

gage.—6. A. having purchased a lot of land, and having paid several instalments of the purchase money, but having received no deed, assigned his right to B., taking a bond from him that if he should obtain the deed on the payment by A. to him of 100*l.* in two years, he would convey the land to A: *Held*, on ejectment brought by B., the two years having expired, that A. could not treat the bond as a mortgage, and redeem on the payment of the principal, interest and costs, under 7 Geo. II. ch. 20. *Doe dem. Shannon v. Roe*, Hil. Term, 7 Wm. IV.

Judgment and execution on a mortgage set aside in favor of an innocent purchaser.—7. A judgment and execution in ejectment on a mortgage will be set aside in favor of an innocent purchaser without notice, so as to enable him to redeem on payment of costs. *Doe dem. Milburn v. Sibbald*, Mich. Term, 6 Wm. IV.

Registrar's certificate evidence of a re-conveyance.—8. *Semble*: That the certificate of the registrar of the discharge of a mortgage, indorsed on the mortgage deed, is sufficient evidence of a re-conveyance under the statute, without shewing the execution of the discharge itself. *Doe dem. Crookshank v. Humberstone*, Hil. Term, 4 Vic.

Crops sown by mortgagor at the instance of mortgagee—Demand of possession.—9. Where a mortgagor in possession, after default made in payment of the mortgage money, received a letter from the mortgagee, who was in a foreign country, directing him to put a spring crop into the land, unless he came into the country in time for the mortgagor to remove in the spring, and he did not come until the summer: *Held*, that notwithstanding the relation between the parties of mortgagor and mortgagee, under the circumstances, the defendant could not be turned out of possession of the land while the

crops were growing, nor without a demand of possession. *Doe dem. Patterson v. Brown*, Hil. Term, 6 Vic.

Usury in debt, for which mortgage given.—10. A. gave his note for a debt justly due by him, untainted with usury, which note was indorsed by B. to C. upon usurious terms, and A. afterwards makes a mortgage to C. to secure the amount payable by the note with interest: *Held*, that although the mortgage was only given to secure what A. was legally liable to in the first instance, as maker of the note, yet C. could not recover upon it, because he had taken it to secure the debt arising from his usurious discount of the note. *Chamberlin v. Chambers*, i. U. C. R. 126.

Stay of proceedings under 7 Geo. II. ch. 20, when the amount on the face of the mortgage is not admitted.—11. In ejectment on a mortgage, the Court will not order the proceedings to be stayed and a re-conveyance to be made under 7 Geo. II. ch. 20, on payment into Court by the defendant of the money due upon the bond and mortgage, together with the costs of the action, where the whole amount secured by the mortgage is not admitted to be due; nor will a reference to the master be ordered, to ascertain the amount actually due in such case. *Doe dem. McKenzie et al. v. Rutherford*, i. U. C. R. 172.

Ejectment by mortgagor against a stranger when mortgage over-due.—12. An action of ejectment cannot be sustained by a mortgagor, to recover possession of the mortgaged premises against a stranger where the mortgage is over-due and unsatisfied, the fee and right of possession being in the mortgagee. *Doe dem. McBernie v. Lundy*, i. U. C. R. 186.

Tenancy between assignee of mortgagor through the sheriff, and mortgagee.—13. The assignee of a mortgagor's interest, through the medium of a sheriff, after the mortgage has been

satisfied, cannot be looked upon as a tenant at sufferance to the mortgagee; a conveyance, therefore, made by the mortgagee while such an assignee was in possession, would be void. *Doe dem. Carey et al. v. Cumberland*, vii. U. C. R. 494.

Memorial to mortgage.—14. It is not necessary in the memorial of a mortgage to notice the proviso for redemption. *Hamilton v. Lyons*, Easter Term, 7 Wm. IV.

MORTMAIN.

See WILL, 10.

9 Geo. II. ch. 36.]—The statute 9 Geo. II. ch. 36, relating to charitable uses is in force in Upper Canada. *Doe dem. Anderson v. Todd et al.*, ii. U. C. R. 82.

MUNICIPAL COUNCIL.

See DISTRICT COUNCIL.

MUNICIPAL COUNCILLOR.

See DISTRICT COUNCILLOR.

MURDER.

See CRIMINAL LAW, 1, 3.

NATURALIZATION.

Seven years' residence of a parent (a foreigner) in this province—Right of her son to inherit.—Seven years' residence of a parent (a foreigner) in this province, makes her a natural born subject of Her Majesty for all purposes; and being so, her heir would be entitled to inherit under 4 & 5 Vic. ch. 7, sec. 3, and more particularly the heir in this case (the lessor of the plaintiff,) who was naturalized by name with other persons under 7 Vic. ch. 43. *Doe dem. Chandler v. Tessier*, vi. U. C. R. 216.

[See statute 10 & 11 Vic. ch. 112.]

NAVIGABLE WATERS.

See WATER, I. 4.

NAVIGATION.

See CARRIER, *passim*.—DEMURRAGE. GENERAL AVERAGE.—GOODS SOLD 2.—INSURANCE, 5, et seq.—PLEADING, II. 7; IV. 2.—PRINCIPAL AND AGENT, 4.—RIDEAU CANAL, 3.

What understood by "dangers of the lake."]—1. Where a defendant had agreed to return a steamer chartered by him on a certain day in good repair, "dangers of the lake excepted," it was decided that damage to the steamer by an accidental fire, not occasioned by lightning, did not excuse the charterers for not returning the steamer in good repair, as it did not come under the exception of "dangers of the lake." *Larned v. McRae*, i. U. C. R. 99.

2. *Quare*: Whether a fire occurring in a steamer from some cause clearly connected with the use of steam, would come within the exception of "dangers of the lake?" *Ib*.

When owners of vessels injured by collision can recover therefor.]—3. In order to enable the owner of a vessel that has been lost or injured by collision to recover damages for the injury, it must appear that the accident was not in any way owing to the negligence, misconduct, or want of skill in those navigating such vessel, and that the provisions of our provincial act 7 Wm. IV. ch. 22 have been, as far as they are applicable, properly observed. *Eberts et al. v. Smythe et al.*, iii. U. C. R. 189.

Steamboat not towing as by contract, owing to ice.]—4. *Semble*: That is no defence to an action against the commander of a steamboat for not towing &c., that he could not perform his contract by reason of his tow-boat being unavoidably frozen in the ice. *Dorland v. Bonter*, v. U. C. R. 583.

Right of master to detain ship or freight for wages &c.]—5. The master of a vessel has no claim or right against the owners to detain the ship or freight for wages, or any disbursements made by him on account of the ship. *Land et al. v. Malden*, v. U. C. R. 309.

NEGLIGENCE.

See ATTORNEY, II(1), *passim*; II (2), 5.—AUCTION ETC., 2.—RAILIFF, 2.—CARRIER, 13, 14, 17.—CASE (ACTION ON THE), 10.—NEW TRIAL, X. 29.—PRINCIPAL AND AGENT, 7.

NE UNQUES ACCOUPLE.

See DOWER, II. 6.

NE UNQUES ADMINISTRATOR.

See EXECUTOR ETC., II. 5, 7.

NE UNQUES SEIZIE.

See DOWER, II. 7, 16.

NEW ASSIGNMENT.

See GUARANTEE, 5.—SHERIFF, III. 5.—TRESPASS, II. 14, 15, 25.

Time to plead.]—1. The defendant has the same time, viz., eight days, to plead to a new assignment as to a declaration. *Unger v. Crosby*, iii. O. S. 175.

Trespass—Statement of time and place in new assignment.]—2. It is not necessary in a new assignment in trespass to state time and place; it is sufficient to allege that the trespasses complained of were committed at other and different times, and on other and different occasions than as in the plea mentioned. *McGillis v. McMartin*, Easter Term, 7 Vic.

Trespass—New assignment not supported by evidence—Non-suit.]—3. The plaintiff declares in trespass in one count for breaking, &c., on the 20th November 1845.—The defendant justifies as assignee under a commission of bankruptcy issued against the plaintiff.—The plaintiff new assigns other trespasses committed on the said 20th November 1845; to which the defendant pleaded “not guilty.” At the trial the plaintiff proved but one trespass committed: *Held*, that under the pleadings, the plaintiff should be non-suited. *Henderson v. Beekman*, iv. U. C. R. 150.

NEW TRIAL.

- I. VERDICT CONTRARY TO LAW, EVIDENCE, OR JUDGE’S CHARGE.
- II. VERDICT ON DOUBTFUL, CONFLICTING, IMPROPER, OR INSUFFICIENT EVIDENCE, OR DISCOVERY OF NEW EVIDENCE.
- III. ABSENCE, MISTAKE, MISCONDUCT, OR INCOMPETENCY OF WITNESSES.
- IV. EXCESSIVE OR TRIFLING DAMAGES.
- V. ALLOWANCE OF SECOND OR THIRD NEW TRIAL.
- VI. MISDIRECTION OF JUDGE.
- VII. JURY IMPROPERLY PANNELLED, OR INFLUENCED—MISCONDUCT OF JURY.
- VIII. SURPRISE—CASE TAKEN OUT OF ORDER OR IN ABSENCE OF COUNSEL.
- IX. WHEN GRANTED CONDITIONALLY—EFFECT OF NON-PERFORMANCE OF CONDITION, WHEN CONDITIONAL.
- X. OTHER CASES, AND GENERAL PRACTICE IN GRANTING NEW TRIALS.
- XI. OF THE MOTION FOR A NEW TRIAL.

I. VERDICT CONTRARY TO LAW, EVIDENCE, OR JUDGE’S CHARGE.

See *BILLS OF EXCHANGE ETC.*, III. 25.—*CONTRACT*, 5.—*DURESS*.—*ILLEGALITY*, 2.—*INSURANCE*, 7.—*MALICIOUS ARREST*, 9.—*NEW TRIAL*, II. 19; V. 1.—*NON-SUIT*, 11. *SHERIFF*, IV. 2, 3.—*TAXES*, 13.—*TRESPASS*, II. 19.—*VERDICT*, 13.

Verdict clearly against—New trial without costs.]—1. Where the jury found for the defendant perversely, and clearly against law and evidence, and the judge’s charge, the Court granted a new trial without costs. *Kerby v. Lewis et al.*, i. U. C. R. 66.

Verdict for plaintiff against law and evidence—No clear grounds shewn by defendant.]—2. Though the Court may think that under the facts proved, in an action on the case for a malicious arrest, a verdict for the defendant would have been more proper than for the plaintiff—yet, if no clear and precise ground has been shewn by the defendant for the suspicion sworn to, and there has been no misdirection on the part of the learned judge at the trial, the Court will not grant a new trial. *Davis v. Fortune*, vi. U. C. R. 281.

Transgression of limits by debtor—Action on bond—Verdict against evidence.]—3. Where in an action on a bond to the limits, it was proved that the principal had been seen fifty yards beyond the limits, and the jury notwithstanding found for the defendant, a new trial was granted on payment of costs. *Chesley v. McMillan*, Easter Term, 3 Vic.

Smallness of damages no objection.]—4. Smallness of damages is no objection to a new trial, when the verdict is manifestly contrary to evidence and the judge’s opinion. *Brookfield v. Sigur*, Tay. U. C. R. 263.

[This case is upheld in *Soper v. March*, Hil. Term, 6 Wm. IV. See cases 7, 14, and 18, *infra*.]

Demurrer admitting the facts, decided—Verdict against evidence—New trial refused.—5. After a demurrer had been decided, which admitted the facts found by the jury on a trial of issues, the Court refused a new trial, which was applied for on the ground that the verdict was contrary to evidence. *Ives v. Hitchcock*, Dra. Rep. 492.

Evidence of Fraud—Doubt as to correctness of finding by the jury.—6. When evidence was given to shew that a deed had been procured by fraud and the jury negatived the fraud, but there seemed great doubts as to the correctness of their finding, a new trial was granted on payment of costs. *Doe dem. Melvin v. Gilchrist*, Trin. Term, 5 & 6 Wm. IV.

Verdict against evidence—Small amount at issue.—7. When the plaintiffs' cause of action in assumpsit was clearly proved, but the jury, notwithstanding, found a verdict for the defendant, the Court granted a new trial, although the amount at issue was small, with costs to abide the event. *Baldwin et al. v. McLean*, Hil. Term, 7 Vic.

Promissory note—Verdict against evidence, through misconception of jury.—8. Where in an action against the indorser of a promissory note, there was strong evidence that the defendant had admitted the indorsement to be his, or to have been made by his authority, whether the signature was genuine or not, and it was doubtful whether the jury had not been led to believe that the sole question for them was, whether the signature was the defendant's or not, and they found a verdict for the defendant, a new trial was granted on payment of costs. *Bank of Upper Canada v. Rogers*, i. U. C. R. 23.

Ejectment—Evidence of fraud in plaintiff's title—Verdict for plaintiff against evidence.—9. Where in ejectment the deed under which the lessor of the plaintiff claimed was in

several parts illegible, and contained no description by which the part of the lot intended to be conveyed could be certainly ascertained, and there was strong evidence that the deed was made to defeat creditors, the Court set aside a verdict for the plaintiff, rendered in opposition to the direction of the judge at Nisi Prius, without costs. *Doe dem. McDonald v. McDonald*, ii. U. C. R. 267.

Want of diligence by defendant in making out a case—Verdict against him contrary to evidence—Relief.—10. Where a losing party has been wanting in diligence to make out his case at the trial, the Court will not, as a matter of course, relieve him against the verdict, though it may appear contrary to evidence. *Doe dem. Wheeler v. McWilliams*, iii. U. C. R. 165.

Trespass for mesne profits—Several issues—Verdict on one issue contrary to evidence.—11. Where in trespass for mesne profits there were several issues joined, and at the trial a verdict was found for the defendants, upon an issue clearly against evidence, the Court granted a new trial to the plaintiff, unless the defendants consented to allow a verdict to be entered upon that issue for the plaintiff. *Anderson v. Todd et al.*, iii. U. C. R. 16.

Verdict against judge's charge but in accordance with justice—Points not raised at trial disallowed in banc.—12. Where the plaintiff, who had been let into possession of land on an agreement to purchase, contracted with another to sell him a quantity of standing timber at so much a tree, which was to be paid for before the timber was taken off the land, and the defendant purchased the timber from the vendee after he had made about 12000 feet of it on the land, agreeing to pay the plaintiff for it in the same manner as the vendee had done; and the plaintiff having failed making his payments for the land, the defendant became the purchaser in fee from his vendor, and

then refusing to pay for the timber, the plaintiff sued him for its value for goods sold and delivered, and the judge at the trial directed the jury that the action should have been brought on the special agreement, but they, notwithstanding, found a verdict for the plaintiff—the Court refused to grant a new trial, as substantial justice had been done between the parties; and the defendant was not allowed to raise an objection in banc. that the action was not maintainable, as he was the owner of the land, because he had not raised that point at the trial. *McMahon v. Campbell*, ii. U. C. R. 158.

Action on bills—Impeachment of consideration—Verdict against evidence.—13. Where in assumpsit on bills of exchange, and for goods sold, the defence was that the bills had been given for the price of goods bought from the plaintiffs in a foreign country, and which they had assisted the defendant in smuggling into this country, and some evidence was given to that effect, but the jury found for the plaintiffs,—the Court refused to grant a new trial. *Walbridge et al. v. Follett*, ii. U. C. R. 280.

Bond—Breach of condition—Verdict against evidence and judge's charge—New trial, although damages trifling.—14. The plaintiff, a sheriff, sues the defendants for a breach of the condition of a bond, in not redelivering to him certain goods seized in execution, on a certain day, at a certain inn.—The defendants plead that they offered them to the plaintiff at the inn on the day named.—The evidence did not prove the defendants' plea.—The jury were told by the learned judge that the plea not being proved, the plaintiff ought to have a verdict for the 6*l.*, the sum remaining unpaid upon the execution. They found however for the defendants: *Held*, that notwithstanding the smallness of the verdict, as the defendants' plea had not been proved, the plaintiff

was entitled to the verdict, and that there must be a new trial without costs. *Moodie v. Bradshaw et al.*, iv. U. C. R. 199.

Trespass—Trespass proved—Verdict for defendant.—15. Where A. having been tried for feloniously shooting at B. and acquitted, was afterwards sued in trespass for the same act, and the jury gave a verdict for the defendant though the trespass was proved, the Court, under the circumstances, declined granting a new trial. *Day v. Hagerman*, v. U. C. R. 451.

Verdict manifestly against evidence.—16. Where a verdict was given for the defendant, as it appeared to the Court, manifestly against evidence, and in support of an assignment impeached as fraudulent, the Court granted a new trial on payment of costs. *Doe dem. Wilks v. Massecar*, v. U. C. R. 455.

Action on marine policy—Finding of jury in accordance with evidence.—17. The plaintiffs (the insured), sued the defendants (the insurers), upon a marine policy, for the loss of a vessel by stranding while navigating the river St. Lawrence. The jury, upon issues raised under the exceptions in the policy as to the negligence and carelessness of the captain and crew in navigating the vessel upon the waters of the St. Lawrence, by which it was alleged that the loss of the vessel had occurred, and not by the ordinary perils of the navigation, found for the defendants. *Held*, upon a motion for a new trial, that upon the evidence, the finding of the jury could not be disturbed. *Gillespie et al. v. British America Fire and Life Assurance Company*, vii. U. C. R. 108.

Trover—Fraudulent transaction on plaintiff's own shewing.—18. Where in an action of trover the Court thought the jury should have treated the transaction as being, on the plaintiff's own shewing, ipso facto fraudulent, they granted a new trial, though

the verdict was only for 11*l.* 10*s.*, with costs to abide the event. *Knowlson v. Conger*, vii. U. C. R. 455.

II. VERDICT ON DOUBTFUL, CONFLICTING, IMPROPER, OR INSUFFICIENT EVIDENCE, OR DISCOVERY OF NEW EVIDENCE.

See ACCOUNT STATED, 5.—ARBITRATION AND AWARD, VI(2), 20. FALSE IMPRISONMENT, 10.—FALSE RETURN, 12.—FRAUDULENT DEEDS ETC., 11.—INDEMNITY BOND, 7.—LIBEL AND SLANDER, III(1), 3.—USE AND OCCUPATION, 2.—USURY, 6.

Verdict founded upon conflicting evidence.]—1. A new trial was refused where a jury had found that a will had been revoked upon very conflicting evidence, the weight of which in the opinion of the judge who tried the cause was against the finding. *Doe dem. Magher v. Chisholm*, Dra. Rep. 227.

New evidence.]—2. A new trial will not be granted upon the ground of fresh evidence, if it do not appear that it could not have been produced at the former trial. *Haren v. Lyon*, Tay. U. C. R. 510.

New evidence—Affidavits.]—3. A new trial in ejectment, on the ground of the discovery of new evidence, was refused, the affidavits not having been sufficiently explicit, and the Court stating that the defendant could bring an action to recover back possession if his evidence could establish his title. *Doe dem. Brown v. Fraser*, Hil. Term, 6 Wm. IV.

[See also case 13, *infra*.]

Assault and battery—New trial granted to elicit evidence.]—4. Where in trespass for assault and battery the defendant offered to prove in mitigation of damages that the plaintiff had slandered his wife, and that he had committed the trespass immediately on being informed of such slander, a new

trial was granted, that all the circumstances might be elicited. *Short v. Lewis*, iii. O. S. 385.

Non-suit for not producing bond set aside on bond being found.]—5. Where the plaintiff was non-suited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, the non-suit was set aside and a new trial granted on payment of costs, the bond having been afterwards found. *Muirhead v. McDougall et al.*, Hil. Term, 2 Vic.

Doubtful evidence—New Trial granted, costs to abide the event.]—6. Where an action was brought to recover a sum of money which had been paid on an agreement which was afterwards cancelled, and the jury found for the defendant on the ground that it did not appear clearly that any payment had been made, a new trial was granted, costs to abide the event, the plaintiffs swearing to the payment, which was not denied by the defendant. *Cowan et al. v. Boyce*, Trin. Term, 3 & 4 Vic.

Trover for promissory notes—Fraud.]—7. Where, in trover for promissory notes against the maker, it appeared that the notes had been given by him on a purchase of land; that the payee afterwards agreed to deliver them up to him on a good consideration; that afterwards, and before their delivery, the payee assigned them by deed to the plaintiff, the notes themselves being in the possession of a third party; that the defendant afterwards received them, having first had notice of the assignment, and no fraud having been shewn, the jury found for the defendant. *Held*, on motion for a new trial, that as these facts would have constituted a good defence in an action by the payee on the notes, the verdict was right in the absence of proof of fraud: a new trial was therefore refused. *Small v. Bennett*, Trin. Term, 3 & 4 Vic.

Libel—Improper admission of evidence under the general issue.]—8. In an action for libel, the publication given in evidence consisted of the report of a trial given in a newspaper of which the defendant was editor and publisher, together with his comments thereon. The libellous matter set forth in the declaration was altogether contained in the comment, and at the trial the defendant gave in evidence under the general issue in justification of his comments that the report of the trial was correct, but the Court, considering that this evidence was inadmissible, granted a new trial without costs. *Small v. M'Kenzie*, Dra. Rep. 183.

Action on a promissory note—Conflicting evidence—New trial refused.]—9. Where in an action on a promissory note the defence was forgery, and a number of witnesses were examined on both sides, and much conflicting testimony given, and the jury found for the plaintiffs, a new trial was refused, although the defendant positively denied the signature on affidavit, and produced numerous affidavits of parties who stated their belief that the signature was not his. *Commercial Bank Midland District v. Denison*, i. U. C. R. 13.

Case for seduction—Motion by defendant—Rule discharged without costs from improper conduct of plaintiff.]—10. In an action for seduction the court refused a new trial, where there was much conflicting testimony, and the verdict was in favor of the plaintiff for 100*l.*, though the judge, who tried the cause was unfavorable; but the rule for a new trial was discharged without costs, as the plaintiff had improperly written letters to the court on the subject of the suit. *Thorpe v. Grier*, i. U. C. R. 528.

Trespass quare clausum fregit—Verdict on conflicting evidence.]—11. Where in trespass quare clausum fregit and cutting and taking away timber, the defendant pleaded payment of 10*l.*

into court, and no damages ultra, on which the plaintiff took issue, and the jury found a verdict for the plaintiff for 60*l.* on conflicting evidence—the Court refused to grant a new trial. *Vail v. Flood*, ii. U. C. R. 133.

Action on note—Set-off—Improper allowance of some items.]—12. Where in assumpsit on a promissory note, the defendant pleaded payment and a set-off, and gave particulars of the account claimed by him, and on the trial he received credit for the sum of 10*l.*, by which the plaintiffs' account was over-balanced, which there was reason to believe had already been credited to him in another account, and should not have been brought with this action—the Court granted a new trial, silent as to costs. *Sutherland et al. v. Small*, ii. U. C. R. 393.

New evidence since trial—Affidavits.]—13. In an action against the acceptor of a bill he pleaded that it was accepted for the accommodation of the plaintiff; and a verdict being found in his favor, the Court refused to set it aside on affidavits of new evidence having been discovered since the trial—the affidavits to establish that point not having been filed until the second term after the rule nisi was moved, and leaving it very doubtful whether the new evidence was of such a nature as would certainly avail the plaintiff. *Morton v. Thompson*, ii. U. C. R. 196.

Slander of plaintiff's steamboat—Insufficient evidence.]—14. Where, in case for the slander of the plaintiff's steamboat, it was averred in the declaration that certain persons were going on a voyage in the steamboat, and that the slanderous words were spoken in the hearing of a particular person named and others, but no proof was given of the voyage, nor of the individuals in whose hearing the words were stated to have been spoken, and the jury found for the plaintiff—the Court held, that the evidence did not support the declaration, and a new trial

was granted without costs. *Hamilton v. Walters*, iv. O. S. 24.

Smuggling—Doubtful evidence.]—15. Where, in an action for goods sold, the defence to which was that the goods were smuggled, it was doubtful (the verdict being general,) whether the jury understood that the plaintiff knew that the goods were contraband—the Court granted a new trial. *Sewell v. Richmond*, Tay. U. C. R. 584.

Action for negligence against an attorney—Insufficient evidence.]—16. Where a promissory note was given to an attorney to get the amount of it secured, and the attorney subsequently said that he would pay the amount in a few days, and an action was afterwards brought against him for negligence in not suing the note, with a count for money had and received—the Court held, that neither count was supported by the evidence; and a verdict having been rendered for the plaintiff, a new trial was ordered without costs. *Drennan v. Boulton*, iii. U. C. R. 72.

Trover for a schooner—Unsatisfactory evidence.]—17. Where in trover for a schooner, there was a great deal of evidence of an unsatisfactory character as to the plaintiff's right to the vessel, and the defendant was not proved to have used or employed it, but merely to have allowed the person who left her with him to take her away, and the jury found a verdict for the defendant—the Court refused to grant a new trial. *Brown v. Allen*, iii. U. C. R. 57.

Leaving evidence to the jury without comment.]—18. Where the learned judge at Nisi Prius consents with reluctance, from his connection with the plaintiff, to try a cause, and from a feeling of delicacy merely gives the case to the jury without comment, leaving them to make out the points from the evidence as they can—the Court, though the evidence may be very conflicting, if they see that the

plaintiff has been probably prejudiced, by the case not having been left to the jury in as full a manner as it would have been under other circumstances, will grant a new trial, with costs to abide the event. *Boulton v. Cooper*, iv. U. C. R. 278.

Plea in abatement—Verdict on conflicting evidence.]—19. The Court will not, as a mere matter of indulgence, give a defendant a second chance of obtaining a verdict on a plea in abatement, when the evidence is conflicting or leaves the fact of joint liability doubtful: *Secus*, if the verdict for the plaintiff be clearly contrary to law. *Tossell et al. v. Dick et al.*, iv. U. C. R. 486.

Ejectment—Insufficient evidence.]—20. In ejectment, the lessor of the plaintiff proved a patent from the Crown, which had been in his possession since 1803. The defendant claimed under a deed from A. to B.—A. was shewn to have been in possession, and no deed from the lessor to A. was produced, nor any evidence given that he had ever executed such a deed. The facts proved only went to shew a bare probability that he might have done so; the jury, however, upon these facts having been left to them as very slight evidence of the patentee's having made a deed to A., found a verdict for the defendant: *Held*, that the verdict must be set aside without costs, there being no legal evidence to be left to the jury, on the facts stated, to shew an alienation by the patentee. *Doe dem. Petit v. Renard*, vi. U. C. R. 501.

Genuineness of indorsement—Doubtful evidence—Affidavits.]—21. A verdict having been given for the defendant on an issue, raised as to the genuineness of his indorsement on a note, the Court, upon consideration of the evidence and the affidavits, refused, in the exercise of their discretion, to grant a new trial. *Maclem v. Dittrick et al.*, vii. U. C. R. 144.

Ejectment by a sheriff's vendee—Insufficient evidence of title.—22. Land not being bound by a judgment for the purpose of sale, under the 5th Geo. II. ch. 7, but only by the delivery of the fi. fa. lands to the sheriff, the time of such delivery should be proved by the purchaser under the sheriff's deed, and where this proof had been omitted, and a verdict had been given for the plaintiff, with leave to the defendant to move for a non-suit—the Court declined non-suiting the plaintiff, but gave a new trial on payment of costs. *Doe dem. Burnham v. Simmons*, vii. U. C. R. 196.

Verdict on insufficient evidence—Damages small, and justice already done.—23. It is no objection to the plaintiff's recovery in trespass that the only trespass proved was committed on a day anterior to the time laid in the declaration; and if there be any evidence of the identity of the premises, the Court will not grant a new trial for want of sufficient evidence, when the damages are small and the justice of the case with the plaintiff. *Molloy v. Stansfield*, ii. U. C. R. 390.

III. ABSENCE, MISTAKE, MISCONDUCT, OR INCOMPETENCY OF WITNESSES.

See div. IV. 4, *infra*.

Action against a magistrate—Absence of a witness—Non-suit.—1. A new trial was refused, where the plaintiff had been non-suited owing to the absence of a material witness from Court, the action being against a magistrate for an act done while in the execution of his office. Per Robinson, C. J.—Macaulay, J., dissentiente. *Stinson v. Scollick et al.*, ii. O. S. 217.

Where only one witness, and he a man of bad character.—2. A new trial was granted after verdict for the plaintiff, on payment of costs, where

the evidence at the trial for the plaintiff was not very satisfactory, and would have entirely failed without the testimony of one witness, who it was sworn was a man of bad character, and had stated after the trial that he had been hired to give evidence, the defendant also swearing that all that the witness had stated was false. *Talbot v. McDougall*, iii. O. S. 644.

Boundaries of lots—Mistake of witness.—3. Where in ejectment, on the question of the boundaries of lots, a surveyor gave positive testimony in favor of the lessor of the plaintiff, founding his evidence on the correctness of a line run by himself from a post which he had planted, and after some conflicting evidence the jury found for the plaintiff; a new trial was granted on an affidavit from the surveyor that he had since the trial discovered that he had been mistaken in the post. *Doe dem. Case v. Magill*, Hil. Term, 6 Wm. IV.

Non-attendance of subpoenaed witness.—4. It is no ground for a new trial that a witness who had been subpoenaed did not attend, having been engaged on some public works. *Woodruff v. Campbell*, Trin. Term, 6 & 7 Wm. IV.

Incompetency of witness—Objection must be taken at trial.—5. A party cannot obtain a new trial on the ground that an incompetent witness has been examined against him, unless he took the objection to his incompetency at the trial. *Doe dem. Sullivan v. Read*, iii. U. C. R. 293.

Motion by plaintiff to increase his verdict, on the absence of a witness.—6. The Court will not grant a new trial to the plaintiff (complaining of smallness of his verdict,) on an affidavit that a witness was absent from the province at the time of trial, and by whom he could better make out his case. *Hodgkinson et al. v. Brown*, iii. U. C. R. 461.

IV. EXCESSIVE OR TRIFLING DAMAGES.

See *SHERIFF*, III. 4.

Torts—Excessive damages.—1. In an action for torts, the Court will not set aside a verdict for excessive damages, except upon very clear and manifestly strong grounds. *McDonald v. Cameron*, iv. U. C. R. 1.

[Also, see case 9, *infra*.]

Covenant for good title—Heavy damages—New trial.—2. *Semble*: That where heavy damages are given in an action of covenant for good title, and it appears that the plaintiff knew the state of the defendant's title, the Court will grant a new trial, and will intend that in that case excessive damages have been given contrary to evidence. *Emery v. Miller*, Tay. U. C. R. 461.

Smallness of damages—New trial at instance of successful party.—3. Where the plaintiff's damages were assessed at a less sum than the evidence appeared to warrant, the Court, at his instance, ordered a new assessment on payment of the costs of the day. *Leonard v. Pauling*, iii. O. S. 17.

[See case 8, *infra*.]

*Slander—150*l.* damages.*—4. In slander, accusing the plaintiff of larceny and a verdict for 150*l.* damages, the Court refused a new trial, either on the ground of excessive damages, or that one of the principal witnesses for the plaintiff was, shortly after the trial, convicted of perjury, and sentenced to banishment. *Eakins v. Evans*, iii. O. S. 383.

Action for false imprisonment—Excessive damages.—5. A new trial will be granted for excessive damages, in an action for false imprisonment. *Armour v. Boswell et al.*, Trin. Term, 4 & 5 Vic.

[See case 11, *infra*.]

Trespass for seduction—Excessive damages.—6. In trespass for seduction, the jury gave a verdict for the

plaintiff with 200*l.* damages, and the Court refused to grant a new trial for excessive damages. *Ross v. Merritt*, iii. U. C. R. 60.

[See cases 13 and 14, *infra*.]

Complicated accounts—Conjecture of jury—Excessive damages.—7. Where a plaintiff and defendant have had open accounts for a long period, and have taken no pains to come to an understanding in regard to the terms of their dealing, or to preserve the means of proving the necessary facts, and the jury find more or less, upon conjecture, what the Court may think excessive damages, for the plaintiff—the Court will, however, very rarely assist the defendant on that ground, by granting a new trial. *Corner v. McKinnon*, iv. U. C. R. 350.

Action for costs of a qui tam action—Damages small.—8. The 18 Eliz. ch. 5 prohibits the compromise of a qui tam action without the leave of the Court. Where therefore a plaintiff, who had brought such an action, agreed to discontinue it upon being paid his costs, and in a subsequent action for those costs recovered much less than he thought the jury should have given him, and applied to the Court for a new trial, the Court, from the nature of the transaction, refused to give him any relief. *Bleeker v. Meyers*, vi. U. C. R. 134.

Tort—Damages small.—9. In an action of tort, when the defendant has had a verdict and the damages are but small, it is always with reluctance that the Court will grant a new trial; they will only do so where the ordinary rights of property seem to have been lost sight of. *Sherwood v. Gibson*, v. U. C. R. 205.

Disputed item of plaintiff's demand improperly disallowed by jury.—10. Where a disputed item, forming one distinct head of the plaintiff's demand, has been improperly disallowed by the jury, the Court will grant a new trial, though the plaintiff has a

verdict for something—the principle upon which the Court refuses a new trial to the plaintiff for smallness of damages not being held to apply. *Maddock v. Glass*, v. U. C. R. 229.

Trespass for false imprisonment—Excessive damages.—11. Held, that a verdict for 1000*l.* against the defendant, under the circumstances of the case, (as fully set out in the report), though in the opinion of the Court excessive, could not be set aside on that ground. *Robertson v. Meyers*, vii. U. C. R. 423.

Item of plaintiff's claim improperly allowed as a set-off.—12. A new trial will not be granted to a plaintiff, in order to enable him to add to his verdict a trifling sum which he says was improperly allowed as a set-off to his claim on the first trial. *Playter v. Taylor*, i. U. C. R. 159.

Excessive damages in an action for seduction.—13. Where in an action for seduction of the plaintiff's daughter, evidence had been given of connivance on the part of the mother, and great negligence on the part of the father, and the jury found a verdict for the plaintiff with 200*l.* damages, the Court granted a new trial. *Bedstead v. Wyllie*, Tay. U. C. R. 71.

14. Gross neglect on the part of the parents is held to be a good ground for a new trial in an action for seduction. *Hogle v. Ham*, Tay. U. C. R. 333.

V. ALLOWANCE OF SECOND OR THIRD NEW TRIAL.

Verdicts contrary to law and evidence.—1. The Court will grant repeated trials where verdicts are rendered contrary to law and evidence, especially in cases affecting continuing rights. *Kirby v. Lewis et al.*, i. U. C. R. 285.

Laches of defendant—Second new trial refused him.—2. Where a new trial had been granted to give an op-

portunity to a defendant of setting up a defence, of which he did not avail himself, the Court refused again to interfere. *Ross v. McNab*, iii. O. S. 309.

Verdict twice the same.—3. If a new trial has been once granted, the Court will not again interfere on a verdict the same way, unless it be manifestly against justice. *Penn et al. v. Ruttan*, Easter Term, 6 Wm. IV.

4. Where verdicts were twice found for a defendant, a second new trial was refused. *Burnside v. Wilcox*, Mich. Term, 7 Wm. IV.

Three verdicts against evidence—Third new trial.—5. The Court, under particular circumstances, declined to grant a third new trial in ejectment, though they thought the evidence strongly preponderated against the verdict. *Doe dem. Harris et ux. v. Benson*, iii. U. C. R. 164.

Replevin—Perverseness of jury.—6. Where the Court has set aside a verdict for the defendant in replevin, upon the ground that he had no legal right of distress, and the jury have found a second time for the defendant, the Court will almost always grant a second new trial to the plaintiff, without costs. *Sanderson et al. v. The Kingston Marine Railway Company*, iv. U. C. R. 340.

Fraud—Third new trial.—7. Where the question of fact for the jury to decide is a question of fraud, and they have twice decided against the fraud, and in favor of the plaintiff, the Court will not, except in very glaring cases, grant a third new trial. *Hunter v. Corbett*, vii. U. C. R. 75.

New trial obtained on merits—Technical objection on second trial.—8. Where the defendant had obtained a new trial on the merits, and then, for the first time, at the second trial, objected that the plaintiff had misconceived his action, and should have brought trover and not trespass, which objection was overruled at the trial, and

subsequently pressed in banc.: *Held*, that they would not, under the circumstances, set aside a second verdict for the plaintiff on this technical objection. *Ib.*

VI. MISDIRECTION OF JUDGE.

See **BILLS OF EXCHANGE ETC.**, IV. 16; VI. 13.—**CARRIER**, 5.—**CONTRACT**, 11.—**NEW TRIAL**, XI. 7.—**PARTNERS ETC.**, 3.

New trials not necessarily granted for misdirection.]—1. If a judge misdirect a jury, the Court will not necessarily grant a new trial for the misdirection, if they be satisfied that justice has been done between the parties, notwithstanding the misdirection. *Connell et al. v. Cheney*, i. U. C. R. 307.

Evidence of notice of action—Misdirection.]—2. Where a witness, who proved the notice required by the statute to be given to a justice of the peace before action brought, had in his examination in chief sworn that he had served a true copy of the notice produced in Court, but upon his cross examination said it might differ a word or two, and the judge at Nisi Prius had in consequence directed the jury to find a verdict for the defendant—the Court granted a new trial. *Gardner v. Burwell*, Tay. U. C. R. 64.

Trespass quare clausum—Admissions—Evidence of the execution of a deed.]—3. Where in trespass quare clausum fregit the plaintiff proved admissions of the defendant as to the title to the land in question, which should have been left to the jury, but the case rested upon the want of sufficient evidence to admit the testimony of the handwriting of the subscribing witnesses to the deed under which the plaintiff claimed, which the Court decided against him—a new trial was granted, with costs to abide the event. *Tylden v. Bullen*, iii. U. C. R. 10.

Malicious arrest—Proof of want of probable cause.]—4. Where in an action for a malicious arrest on a capias

ad respondendum, the learned judge at the trial was of opinion that want of probable cause had not been shewn by the evidence, and charged the jury strongly to that effect, but still, did not *peremptorily* direct them to find for the defendant—the Court granted a new trial without costs. *Tyler v. Babington*, iv. U. C. R. 202.

Debtor's goods purchased at sale by execution creditor, and lent to execution debtor—Subsequent seizure by sheriff.]—5. Where goods have been openly set up under a fi. fa., and bona fide bought by the execution creditor, he may, if he please, lend them immediately after sale to the execution debtor, and while in his possession they cannot be seized by the sheriff at the suit of a subsequent execution creditor; and where they had been so seized, and the sheriff was sued in trespass by the execution debtor, and the jury found for the defendant upon a direction from the judge that such arrangements must be looked upon as in themselves, without reference to the facts of the case, inconsistent with good faith and the rights of subsequent creditors—the Court set aside the verdict for misdirection, and granted a new trial, with costs to abide the event. *Williams v. McDonald*, vii. U. C. R. 381.

VII. JURY IMPROPERLY PANNELLED, OR INFLUENCED—MISCONDUCT OF JURY.

See **JURY**, 4, 6, 7.—**NEW TRIAL**, V. passim.

Jury summoned by near relative of successful party.]—1. A new trial will not be granted on the ground that the jury who tried the cause were summoned by a near relative of the party who obtained the verdict. *Penn et al. v. Ruttan*, Easter Term, 6 Wm. IV.

Action against sheriff—Coroner's jury, same as returned by sheriff himself.]—2. The Court refused to set

aside a verdict against a sheriff, upon the ground that the coroner's jury who tried the cause was the same as that returned by the sheriff; that the plaintiff had produced the original ca. sa., instead of a copy; or that the judgment against the party escaping had been obtained without consideration. *Payne v. M'Lean*, Tay. U. C. R. 444.

[Also, *SHERIFF*, I. 15.]

Misconduct of Jury.—3. Where, after a verdict for the plaintiff, it was shewn that after the jury had retired to consider their verdict communications had been made to them by persons out of the jury room, that they had been furnished with provisions and spirituous liquors by persons who were known to be friendly to the plaintiff, and there was reason to believe that they had received an improper bias, a new trial was granted with costs to abide the event. *Armour v. Boswell*, Easter Term, 5 Vic.

Influence on jury by defendants' offer, not afterwards carried into effect.—4. Where an offer was made by the defendants' counsel at the trial, and which it was said was to be carried into effect without reference to the verdict, and the jury being influenced by the statement gave a less amount of damages than they might otherwise have done; the Court, upon the refusal of the defendants to sanction that offer of their counsel, set aside the verdict, but with costs to abide the event, as no wilful intention to mislead the jury was imputed to the statement. *Watson v. Gas Light Company*, v. U. C. R. 244.

VIII. SURPRISE—CAUSE TAKEN OUT OF ORDER OR IN ABSENCE OF COUNSEL.

See EJECTMENT, V. 7.—NON-SUIT, 17.

Generally—Discovery of a new witness.—1. The Court will not grant a new trial on the ground of surprise, unless in clear cases and where the grounds are strong and specific; if the

surprise be the discovery of a witness, of whom the plaintiff was not aware, it must be stated what evidence that witness can give, and generally the witness himself must shew the Court, on affidavit, what facts he can prove. *Robinson v. Rapelje*, iv. U. C. R. 289.

Surprise, special defence pleaded and supported—Plaintiff unprepared to meet it.—2. Where in an action on a promissory note by payee against maker, the defendant places upon the record special matter in defence, and upon the trial proves such matter and obtains a verdict—the Court will not grant a new trial on an affidavit by the plaintiff, that he had no idea the defendant really intended to set up such a defence, but supposed it was pleaded merely to gain time, and therefore did not prepare to meet it, and likewise, of his ability to meet such a defence on another trial. *Prout v. Pollard*, i. U. C. R. 170.

New trial granted, defendant having given unfair and unexpected evidence.—3. Where a plaintiff was taken by surprise at a trial, by unfair evidence given by the defendant, and in consequence recovered much less than he was entitled to, he was granted a new trial on payment of costs. *Cummings v. Hawn*, Mich. Term, 4 Vic.

Disappointment in evidence given by a witness.—4. Where a defendant denied his indorsement of a note, and a witness who swore on his examination in chief to his having actually seen the defendant sign the note, but on his cross examination could not swear to the identity of the paper indorsed; and the plaintiff, expecting to prove the actual indorsement by this witness, was not prepared to prove the defendant's hand-writing, and had a verdict against him—the Court granted a new trial on payment of costs. *Murphy v. Fraser*, iv. U. C. R. 194.

Ejectment—Application for new trial on grounds of surprise—Defec-

tive affidavits.—5. Where the lessor of the plaintiff in ejectment gave evidence of a former possession, and recovered upon that, without being put to the necessity of proving a paper title, and the defendant not having offered any evidence of title, at the trial, applied for a new trial upon affidavits alleging surprise, but it not appearing what title he could have shewn, the Court discharged his application. *Doe dem. Stewart v. Yager*, v. U. C. R. 584.

Ejectment—Defendant unprepared to meet plaintiff's case.—6. A new trial was granted to the defendant in ejectment on the ground of surprise, the plaintiff claiming title by an estoppel, which the defendant was not prepared to meet. *Doe dem. Yager et al. v. Stewart*, vii. U. C. R. 174.

Cause taken out of its turn—Affidavit of merits insufficient for new trial.—7. Where a defendant applies for a new trial on the ground that he was taken by surprise by the cause being taken out of its turn, and was unprepared to enter into his defence, he must not rely on a general affidavit of merits, but shew that he had a defence admissible under the pleadings, which he would have been able to sustain. *Moore et al. v. Hicks*, vi. U. C. R. 27.

[See also next case, and case 13, *infra*.]

8. It is not a sufficient ground for setting aside a verdict and granting a new trial that a cause was taken out of its order on the cause list, and in the absence of the defendant's attorney and counsel, unless it be also shewn that the defendant has some defence which it is proper that he should be allowed to urge. *Doyle v. Fraser*, Hil. Term, 6 Wm. IV.

Where defendant endeavored to reach assizes in time, but failed in doing so.—9. A new trial was granted on payment of costs where the defendant had done all in his power to reach the assizes in time with his wit-

nesses, but had arrived about two hours too late, it being suggested also that there were merits. *Harrington v. Stone*, Hil. Term, 6 Wm. IV.

Cause called on in absence of counsel—New trial granted on payment of costs.—10. Where the plaintiff was non-suited, his cause having been unexpectedly called on in the absence of his attorney and counsel, several causes before it on the docket having been suddenly disposed of, the Court refused to set aside the non-suit, except on payment of costs. *Doe dem. Dunlop v. McNab*, Hil. Term, 5 Vic.

Attorney mistaking place of cause on docket.—11. A new trial was granted under particular circumstances, where the defendant's attorney mistook the place of the cause on the docket, and lost in consequence an opportunity of making a defence. *Dove v. Dalby*, v. U. C. R. 457.

Undefended cause—Defendant's counsel absent from illness.—12. The Court refused to set aside a verdict in an undefended cause on an affidavit that the defendant's counsel was absent from illness, no attorney having appeared at the trial to attend to the cause, and no application having been made to put it off. *Gunn v. Van Allen*, v. U. C. R. 513.

[See case 15, *infra*.]

Cause brought on in absence of counsel—Necessary statement in moving Court.—13. The defendant, in moving the Court in banc. for a new trial on the ground that his cause was taken on the first day of the assizes in the absence of his attorney or counsel, must unequivocally state that he has a just and legal defence to the action. *Pardow v. Beatty*, vi. U. C. R. 496.

Absence of counsel.—14. A new trial was granted upon conditions as to payment of verdict and costs, which the plaintiff had recovered against the defendant (a sheriff) during the absence of his counsel. *Martin v. Corbett*, vii. U. C. R. 169.

Undefended cause—Merits.]—15. Where a verdict was taken for the plaintiff in an undefended cause, and no application was made to put off the trial, the Court nevertheless granted a new trial on an affidavit of merits, and special affidavit of circumstances. *Lockhart v. Milne*, i. U. C. R. 444.

Seduction—Verdict for defendant, plaintiff being unprepared to meet defendant's evidence.]—16. The Court refused a new trial in case for seduction where the jury had found for the defendant on evidence clearly impeaching the character of the seduced, although affidavits were produced on motion that if the plaintiff had a new trial he would rebut such evidence, and that he would have been prepared to do so at the former trial had he had notice. *Monk v. Capelman*, Mich. Term, 6 Wm. IV.

IX. WHEN GRANTED CONDITIONALLY. EFFECT OF NON-PERFORMANCE OF CONDITION, WHEN CONDITIONAL.

See Costs, VIII. 10.

Condition imposed upon the death of a witness, after motion.]—1. Where after a verdict for the plaintiff and cause shewn on affidavits against a rule for a new trial a person who made one of the affidavits for the plaintiff died, it was made a condition of the rule absolute that his affidavit should be received in evidence at the next trial. *Gass v. Colcleugh*, Easter Term, 3 Vic.

Rule to discharge rule for new trial absolute in first instance.]—2. Where a new trial is granted on payment of costs, and the costs are not paid, the rule to discharge the rule for a new trial and to enter judgment is absolute in the first instance. *Drean v. Smith*, Trin. Term, 1 & 2 Vic.

Rule ordering discharge if costs not paid in a fortnight.]—3. Where

a new trial was granted on payment of costs, and the costs were taxed and demanded but not paid, the Court the same term ordered a rule to be made absolute for discharging the rule for a new trial, if the costs were not paid in a fortnight. *Wynn v. Palmer*, Easter Term, 3 Vic.

Tender of costs without disbursements.]—4. Where a new trial was granted on payment of costs by the plaintiff who served three appointments on the defendant for the taxation, and the costs were at last taxed without disbursements, which the plaintiff would not pay, but proceeded again to trial and obtained a verdict, the Court refused to set it aside. *Thompson v. Sewell*, iv. O. S. 16.

Payment of costs after rule for new trial discharged.]—5. Where a new trial is ordered on payment of costs, the party to whom the indulgence is granted must attend promptly at the taxation and payment of costs; and if he suffer so long a time to elapse that the plaintiff cannot proceed to trial at the next assizes without embarrassment, the Court will not, after the plaintiff has obtained a rule to enter judgment, discharge the rule and allow the defendant the benefit of his rule for a new trial. *Johnson v. Sparrow*, i. U. C. R. 396.

Default in paying costs—Further time.]—6. Where a defendant was granted a new trial on payment of costs which he did not pay, and the plaintiff in consequence obtained a rule to enter judgment, the Court, under special circumstances, discharged the rule for judgment, and gave the defendant a week's further time to pay all the costs. *Reeves v. Myers*, Trin. Term, 4 & 5 Vic., P. C. Macaulay, J.

[See rule of Hilary Term 1850, No. 39.]

X. OTHER CASES, AND GENERAL PRACTICE IN GRANTING NEW TRIALS.

See **ABSCONDING DEBTOR**, 15. —
AMENDMENT, II. 11, 39.—**EJECTMENT**, IV(1), 7; V. 2, 8; VIII. 15.
JURY, 4, 6 —**NON-SUIT**, 19, 20.—
SHERIFF, III. 14.—**VERDICT**, 9.—
WATER, 3.

When Court imposes costs.]—1. In granting a new trial the Court imposed costs because the ground on which it was granted was not taken at *Nisi Prius*. *Griffiths v. Welland Canal Company*, Mich. Term, 2 Vic.

Not granted merely as of right.]—2. New trials will not be granted upon the extreme right of the party applying merely, but only to advance the substantial ends of justice. *Brown v. Street*, i. U. C. R. 124.

Only granted to advance justice.]—3. A new trial will only be granted to advance the substantial ends of justice when the grounds are discretionary with the Court. *Doe dem. Graham v. Edmondson*, i. U. C. R. 265.

New trials refused when justice has been done.]—4. Where justice has been done between the parties, the Court refused to grant a new trial upon the ground that it had been agreed between the contending parties that a third person should have been applied to to settle the subject matter of the action, the third person being under no legal liability to do so. *Nevils v. Wilcox*, Tay. U. C. R. 358.

Omission by counsel to shew a certain right at Nisi Prius.]—5. Where the losing party has failed at the trial, from the omission of his attorney to establish some legal right he might have shewn, the Court will exercise their discretion in granting a new trial; they will not grant this indulgence when an expensive litigation would be protracted about a trifling matter. *Petrie v. Taylour*, iii. U. C. R. 457.

Omission by attorney to give notice to produce.]—6. The Court will not grant a new trial because the defendant's attorney had omitted to give a notice to produce a deed, by which

omission the defendant was precluded from going into one branch of his defence, when the facts, if proved, would not have formed a legal bar to the action. *Gates et al. v. Crooks*, Dra. Rep. 459.

Important facts proved, but omitted in judge's notes.]—7. *Quære*: Where the judge who tried a cause has omitted to note the evidence of an important fact, which he charged the jury was proved, and upon which their verdict was founded, whether upon affidavit that such fact was actually proved, though it does not appear by the judge's report of the evidence, the Court will grant a new trial? *Winchester v. Cornell*, Dra. Rep. 63.

[See case 21, *infra*.]

Plaintiff entitled to something in the form of action chosen by him.]—8. Where in trespass for taking staves, the plaintiff recovered twenty pounds, where the law on some of the facts which were improperly elicited at the trial was doubtful, but it appeared that the plaintiff was entitled to recover something in that form of action, and the residue in another form, a new trial was refused, although a tender could have been pleaded to the amount of the whole claim if the action had been brought in another form. *Ballard v. Ransom et al.*, ii. O. S. 70.

Amount of verdict large—No defence made—Merits.]—9. In this case the verdict for the plaintiff being for more than 300*l.*, the defendant not having made any defence, because the judge at *Nisi Prius* would not try the cause by a special jury, the notice of striking such special jury being insufficient—the Court granted a new trial, the defendant having made a strong affidavit of merits, and the amount of the verdict being ordered to be paid into Court, to stand as a security for the plaintiff. *Bell v. Flintfoot*, iii. U. C. R. 122.

Trover for a horse—Evidence of conversion—New trial.]—10. A.

having been arrested at the suit of a third person, placed a mare in B.'s possession, on an agreement that B. should go, and if the party arresting proved a demand against A., by his own oath or that of others, B. was to pay it and keep the mare till re-paid. B. did pay 10*l.*, but without shewing that he did so in consequence of its being sworn to, and the mare remaining with him, he used her once in the plough. A. thereupon, without demand, brought trover, alleging that this use of the mare was a conversion, and obtained a verdict—the Court granted a new trial without costs. *Forrester v. Spencer*, iii. O. S. 47.

New trials will not be granted contrary to justice.]—11. The Court will not set aside a verdict for the plaintiff, where the justice of the case appears strongly with him, merely because there was at the trial a preponderating weight of evidence on the part of the defendant in support of a plea of the Statute of Limitations. *McMillan v. Fairfield*, ii. O. S. 493.

Where justice apparently has not been done.]—12. Where a trial was put off at the assizes on affidavit of the absence of material witnesses, and on payment of costs of the day, and the defendants' attorney declined paying those costs himself, the defendants being absent, in consequence of which the trial proceeded, and no defence was made—the Court, on affidavits which gave reason to apprehend that justice had not been done, and considering the large amount of the verdict, granted a new trial on payment of costs. *Oliver v. Stephens et al.*, iii. O. S. 21.

Ejectment—New trials not necessarily granted on merits.]—13. Though a probability exist that a defendant in ejectment may have merits, the Court will not necessarily grant a new trial, the verdict in ejectment not being conclusive upon the parties. *Doe dem. Stansfield v. Whitney*, Tay. U. C. R. 64.

Separate actions on a bond and mortgage—Same evidence—Inconsistent verdicts.]—14. Where to debt on bond usury was pleaded, and a verdict found for the plaintiff, and at the same assizes an action was tried on a mortgage, between the same parties, to secure the money on the bond, the same defence was set up and the same evidence was adduced, and the jury found for the defendant—the Court refused to set the verdict on the bond aside. *Wilson v. Hill*, Hil. Term, 6 Wm. IV.

Ejectment—Defence of mortgage to a third party—New trial.]—15. The Court will not grant a new trial to enable a mortgagor, being lessor of the plaintiff in ejectment, to shew his own deed void for usury, and thus eject a stranger who sets up as a defence a mortgage to a third party for the premises in question. *Doe dem. McBernie v. Lundy*, i. U. C. R. 186.

Verdict on the merits—New trial on technical objections.]—16. If there be a verdict for the plaintiff on the merits, a new trial will not be granted, because technically, a verdict should be found on some issues for the defendant, and where, if a new trial were granted, a repleader would be awarded, and a verdict again found for the defendant. *Helliwell v. Eastwood et al.*, Easter Term, 4 Wm. IV.

Granted to enable an executor to plead plene administravit.]—17. In a very hard case a new trial was granted to enable an executor to plead plene administravit. *McMartin v. Traveller*, Easter Term, 6 Wm. IV.

New trial to an executor refused.]—18. Where in an action against an executor on the bond of his testator non est factum was the only plea pleaded, and the plaintiff had a verdict, the Court refused to grant a new trial and allow a plea of plene administravit, on the affidavit of the executor that he had administered all the assets before

action brought, there being no satisfactory answer given why the plea had not been pleaded before. *McDonald v. DeTuyle*, Easter Term, 5 Vic.

Mistake of attorney contrary to instructions.]—19. Where in trespass against a sheriff's bailiff for seizing goods the general issue only was pleaded and the plaintiff had a verdict, a new trial was granted on payment of costs, on affidavit that the defendant had instructed his attorney to defend under writs of execution, and the attorney had considered that the defence might be urged under the general issue. *Williams v. Knapp*, Hil. Term, 4 Vic.

Verdict for plaintiff—Demurrers against him—Amendment and new trial.]—20. Where in an action of trespass there were several issues in law and fact arising on several special pleas going to the whole cause of action, and the plaintiff, before the argument of the demurrers, went to trial and assessed his damages at 17*l.* 10*s.*, having proved only one act of trespass, and the demurrers were afterwards admitted to be against him, the Court refused to allow him to set aside his verdict, amend his pleadings, and go to a new trial. *Tyrrel v. Myers*, Trin. Term, 5 & 6 Vic.

Rejection of evidence.]—21. Where a new trial was moved for on the ground that evidence had been rejected which should have been received, and the judge's notes at the trial did not shew the rejection, and he did not recollect it, a new trial was granted on the ground of misapprehension, on payment of costs. *Proudfoot v. Trotter et al.*, Mich. Term, 6 Vic.

Inconsistent verdicts by same jury.]—22. Where a jury found a verdict for the plaintiff and 5*l.* damages, with a condition that each party should pay his own costs, and the Court having refused to receive the verdict in that way, they altered it to a verdict for the defendant with the same condition, and subsequently on that verdict being

refused also, to an unconditional verdict for the defendant, a new trial was granted without costs. *McKay v. Lyons*, Easter Term, 7 Vic.

Misunderstanding of counsel respecting verdict.]—23. Where a verdict was taken subject to the opinion of the Court upon certain points as to whether the plaintiff was entitled to recover substantial or merely nominal damages, and there was a misunderstanding between the counsel of the respective parties as to the terms upon which the verdict was taken, a new trial was granted without costs. *McLeod v. Boulton*, ii. U. C. R. 44.

Trespass—Verdict against four defendants—New trial to one.]—24. A verdict in trespass against four was allowed to stand against three defendants, and a new trial was granted in favor of the fourth. *Davis v. Moore et al.*, ii. U. C. R. 180.

Change of rule from non-suit into new trial.]—25. Where a defendant obtains a rule for a non-suit as on leave reserved, and it afterwards appears that no such leave was reserved, the Court will not allow him to change his rule into a rule for a new trial. *Doe dem. Gilkison v. Shorey*, ii. U. C. R. 183.

When smallness of damages no objection.]—26. Where a verdict would be conclusive to the parties' rights, smallness of damages would be no objection to setting it aside. *Soper v. March*, Hil. Term, 6 Wm. IV.

Defence of forgery to an action on a promissory note—New trial refused.]—27. Where the defence intended to be urged by the indorsers of a note was forgery, and they defended on that ground at the trial, and the plaintiff recovered—the Court refused to grant a new trial. *McLaren v. Muirhead et al.*, iii. U. C. R. 59.

Refusal of judge at Nisi Prius to admit evidence when case closed.]—28. It is no ground for a new trial that the judge at Nisi Prius refused to allow the plaintiff, after he had closed

his case, to supply the evidence of a fact he had omitted to prove. *Benedict v. Boulton et al.*, iv. U. C. R. 96.

New trial not granted to party unsuccessful through his own negligence.—29. The Court grant new trials for the purpose of justice. They will not grant them to protract an idle litigation about facts which neither party will take the trouble to make clear, though the means of doing so are shewn to be within their reach. Where a jury, not thinking it safe to rely on verbal evidence as to the contents of a lost will when the party offering it is shewn to have been aware of the existence of a written copy of the will which he might have produced at the trial, gave a verdict against him, the Court will not grant a new trial. *Doe dem. Wheeler v. McWilliams*, iv. U. C. R. 30.

Verdict for defendant on the evidence and without misdirection—When new trial granted.—30. In an action on the case for negligent driving when the fact of negligence goes fully to the jury and they find for the defendant, and no misdirection on the part of the learned judge at Nisi Prius is complained of, the Court, unless it appear that the evidence is conclusive in favor of the plaintiff, will not grant a new trial. *Kenny v. Cook et al.*, iv. U. C. R. 268.

Verdict contrary to evidence of unimpeached witness.—31. A new trial will not be granted because the jury find for the defendant in the absence of any evidence to contradict the unimpeached witness of the plaintiff. The jury are to form their verdict upon the whole facts and complexion of the case before them. *Lane et al. v. Jarvis*, v. U. C. R. 127.

XI. OF THE MOTION FOR A NEW TRIAL.

See JURY, 9.—NEW TRIAL, I. 12; II. 3, 13; VIII. 1, 7, et passim.

When to be made.—1. The motion for a new trial must be made within the first four days of the term succeeding the trial, i. e., before the expiration of the rule for judgment. *Orser v. Stickler*, Tay. U. C. R. 46.

New grounds.—2. *Semble*: On motion for a new trial after *argument*, the Court will allow a new ground to be taken by the party moving if the justice of the case require it. Per Sherwood, J.—Macaulay, J. contra. *Vary v. Muirhead*, ii. O. S. 121.

Affidavit sworn before partner of defendants' attorney.—3. A new trial was moved by the defendants on an affidavit sworn before the partner of the defendants' attorney. *Held*, on an exception being taken when shewing cause, that the rule must on that ground be discharged. *White v. Petch et al.*, vi. U. C. R. 13.

Affidavit of wife of party to the cause.—4. An affidavit of the wife of a party to cause cannot be read on motion for a new trial. *Henderson v. Wallace*, Easter Term, 2 Vic.

[Affidavits of jurors—See JURY, 9, and note thereto.]

Objections raised in banc. not urged at Nisi Prius.—5. A party moving for a new trial cannot take an objection which he did not urge at Nisi Prius. *Hall v. Shannon*, Easter Term, 2 Vic.

Trespass for assault and battery—Pleadings—Evidence.—6. Where in trespass for assault and battery the defendant pleaded molliter manus imposuit in defence of possession, and the plaintiff replied de injuria: *Held*, on a motion for a new trial, that the plaintiff was at liberty to shew that the defendant's justification was not proved although he had made no objection to it at the trial, and that he might abandon the ground which he had taken there, and retain his verdict for want of proof of justification. *Roddy v. Moffatt*, Easter Term, 2 Vic.

7. Where a party at the trial does not object to the charge of the judge, he cannot afterwards urge, on a motion for a new trial, that there was a misdirection, although the charge be in fact open to exception. *Manners v. Boulton et al.*, Mich. Term, 7 Vic.

8. Where in an action of covenant for non-payment of rent on a lease for a year, by which an entire rent was reserved, and in which there were various other covenants, breaches of which were also assigned, and the plaintiff had a verdict—the Court refused to grant a new trial, on an objection made in banc., but which had not been taken at *Nisi Prius*, that the action was brought before the year expired when the rent was to be paid. *Stephens v. Allan*, ii. U. C. R. 282.

9. In ejectment by co-heiresses it was proved that the party in possession had acknowledged the ancestor's title, and it was also shewn that the lessors of the plaintiff were his children, but the jury found for the defendant; on motion for a new trial, the Court would not entertain the objection that it had not been proved that the lessors were the *legitimate* children of the alleged ancestor, as that point had not been raised at the trial. *Doe dem. Morrough et al. v. Maybee*, ii. U. C. R. 389.

NEW YORK.

See FOREIGN LAW, 5.

NEW YORK CURRENCY.

See CURRENCY.

NIAGARA HARBOR AND DOCK COMPANY.

Assumpsit against, on a parol agreement.—Assumpsit is not maintainable against the Niagara Harbor and

Dock Company, incorporated by 1 Wm. IV. ch. 12, on a parol agreement entered into by the company to build an engine for a steamboat. *Hamilton v. Niagara Harbor and Dock Company*, Easter Term, 5 Vic.

NIL DEBET.

See LIMITS, II. 9.

NIL HABUIT IN TENEMENTIS (PLEA OF).

See COVENANT, II(2), 4.

NISI PRIUS (PROCEEDINGS AT).

See AMENDMENT, II. passim.—ATTACHMENT, II. 7.—ATTORNEY, IV. 2.—BOND, II. 10.—COMMISSION TO EXAMINE WITNESSES, 2, 7.—COSTS, I(3).—EJECTMENT, IV(1), 6; VIII. 15.—EVIDENCE.—NONSUIT.—NOTICE TO PRODUCE, 4.—ONUS PROBANDI.—PRACTICE, III. 5.—SUBPENA, 2, 3.

NISI PRIUS RECORD.

See RECORD (NISI PRIUS).

NOLLE PROSEQUI.

See ACTION, 6.—IRREGULARITY, 11.

After judgment.—1. A nolle prosequi cannot be entered after judgment. *Roach v. Potash et al.*, Mich. Term, 3 Vic.

Declaration containing two counts—Nolle prosequi to first—Evidence under second.—2. The plaintiff declares on two counts—first on a promissory note, second on an account stated; to the defendant's plea to the first count the plaintiff replies, to which replication the defendant demurs; the plaintiff then, to avoid the risk of the demurrer, enters a simple nolle prosequi to the first count: *Held*, that

the plaintiff might give the note in evidence under the second count, on the account stated: *Semble*, such evidence would have been inadmissible if the nolle prosequi had involved an express admission, as it some times does, that the plaintiff had no right of action on the note. *Leslie v. Davidson*, iii. U. C. R. 459.

As to one of two defendants.]—3. Where a plaintiff sues two or more defendants as executors, the entering a nolle prosequi and discontinuing as to one, is not a discontinuance of the action. *Masson v. Hill et al.*, v. U. C. R. 60.

NOMINEE OF THE CROWN.

See DOWER, I. 1.—ESTOPPEL, 1, 2, 3.

NON ASSUMPSIT (PLEA OF).

The rule making the plea of non-assumpsit to a bill or note bad, is confined to cases where the action is between the parties to the bill or note; it does not extend to executors, &c. *Masson v. Hill et al.*, v. U. C. R. 60.

NON DAMNIFICATUS (PLEA OF).

See BOND, II. 19.—INDEMNITY BOND, passim.

NON EST FACTUM (PLEA OF).

See ARBITRATION AND AWARD, VI (2), 10.—BOND, II. 2.—LIMITS, II. 3.—VARIANCE, 15.

NON FEAZANCE.

See CASE (ACTION ON THE), 4.

NON JOINDER.

See ABATEMENT, 1, 3, 4, 6, 8, 9.—BILLS OF EXCHANGE ETC., IV. 2.—NONSUIT, 6.

NON PROS.

See JUDGMENT OF NON PROS.

NONSUIT.

See ACTION, 6.—ARBITRATION AND AWARD, VI(2), 19.—BAIL, II. 14. EJECTMENT, V. 2, 7, 8.—GUARANTEE, 6.—INDEMNITY BOND, 6.—INTERPLEADER, 7.—LIBEL AND SLANDER, III(1), passim.—LIMITATIONS (STATUTE OF), IV. 10, 11, 12.—MALICIOUS ARREST, 20.—MISNOMER.—NEW ASSIGNMENT, 3.—NEW TRIAL, II. 5; X. 25.—PENAL ACTION, 3.—USE AND OCCUPATION, 4.—VERDICT, 9.

Voluntary—Setting aside.]—1.

Where a plaintiff suffers a nonsuit voluntarily, the Court will not afterwards set it aside. *Saunders v. Playter*, Tay. U. C. R. 44.

Point must be reserved at Nisi Prius.]—2. A nonsuit cannot be moved for in banc. unless a point has been reserved at Nisi Prius. *Brookfield v. Sigur*, Tay. U. C. R. 263.

3. A nonsuit cannot be moved for in banc. unless it has been moved for at Nisi Prius, and the point reserved by the judge with the plaintiff's consent. *Hawley v. Ham*, Tay. U. C. R. 529.

Effect of examination of witness after motion for.]—4. If a defendant move a nonsuit, and afterwards examine witnesses, the plaintiff is entitled to any benefit which he can obtain from the evidence in support of his case. *Brock v. M'Lean*, Tay. U. C. R. 548.

Absence of attorney and counsel.]—5. Where a cause is called on for trial at Nisi Prius, and neither counsel or attorney appears for the plaintiff, a jury may be sworn and a nonsuit ordered. *Falls v. Lewis*, Dra. Rep. 281.

Non joinder.]—6. Non joinder of a plaintiff in assumpsit is a ground of nonsuit. *Walker et al. v. McDonald*, iv. O. S. 12.

Time for choosing nonsuit.—7. A plaintiff cannot elect to take a nonsuit after verdict rendered for the defendant, but before it is recorded. *Whiten et al. v. Caverley*, Hil. Term, 6 Wm. IV.

Although pleadings supported by evidence.—8. A plaintiff may be nonsuited although his evidence support his pleadings. *McPherson et al. v. Hamilton*, Easter Term, 7 Wm. IV.

Objections must be first raised at Nisi Prius.—9. A party moving to enter a nonsuit cannot take an objection which he did not urge at Nisi Prius. *Hall v. Shannon*, Easter Term, 2 Vic.

Omission of a promissory note in particulars.—10. Where a declaration contained a count upon a promissory note and common counts, and the plaintiff, under an order for particulars, gave an account for goods sold and delivered only, but at the trial the defendant cross-examined upon the note, and afterwards at the close of the plaintiff's case obtained a nonsuit because the note was not mentioned in the particulars, the nonsuit was set aside without costs. *Bigelow v. Spragge*, Hil. Term, 6 Wm. IV.

Joint contractors—Verdict against one, nonsuit as to others—New trial.—11. The plaintiffs charge the defendants upon a joint contract—one of the defendants allows judgment to go by default; the plaintiffs at the trial take a verdict against him and elect to be nonsuited as to the others: *Held*, that the plaintiffs' suing the defendant on a joint contract could not have a verdict against one and be nonsuited as to the others, and that the verdict must be set aside and a new trial granted without costs. *The Commercial Bank v. Hughes et al.*, iii. U. C. R. 361.

[See cases 12 and 15, *infra*.]

Several defendants—Judgment by default against some, nonsuit as to others.—12. A plaintiff may be nonsuited as to some of several defen-

dants, though judgment by default has been entered against the others. *Benedict v. Boulton et al.*, iv. U. C. R. 96.

Objections in banc. not raised at trial, or in moving rule.—13. In an action for malicious arrest the defendant cannot succeed in banc. in nonsuiting the plaintiff or in obtaining a new trial, on the ground that no probable cause was shewn if he took no such objection either at the trial, or in moving for his rule. *Jones v. Duff*, v. U. C. R. 143.

Affidavits of conversations with jurors.—14. The Court will not act upon affidavits stating conversations with one of the jury, after the trial, respecting the grounds of their verdict. *Ib.*

Several defendants—One allows judgment to go by default.—15. In an action against several defendants though one suffer judgment by default, the plaintiff may be nonsuited. *McNab v. Wagstaff*, v. U. C. R. 588.

Election of nonsuit by plaintiff binding upon him.—16. Where the plaintiff elects to be nonsuited rather than go to the jury on the charge of the judge, he cannot afterwards move to set the nonsuit aside. *Stuart qui tam v. Bullen*, i. U. C. R. 451, and *McGrath v. Cox*, iii. U. C. R. 332.

Joint action under 5 Wm. IV. ch. 4—Judgment by default by one—Nonsuit as to both.—17. Where in an action against the maker and indorser of a promissory note under 5 Wm. IV. ch. 1, one defendant pleaded the general issue, and the other allowed judgment to go by default, and at the trial the plaintiff was nonsuited as to both, no one being present in the Court on his behalf, the nonsuit was set aside on payment of costs. *Small v. Powell et al.*, i. U. C. R. 427.

Reserving leave for defendant to move—Consent of plaintiff.—18. If at Nisi Prius the defendant move for a nonsuit on a point which the judge overrules, but reserves leave to move,

and the plaintiff's counsel does not object, his acquiescence to the leave reserved must be presumed. *Ducat v. Sweeny et al.*, Trin. Term, 2 & 3 Vic.

Assumpsit for work done under a sealed contract, when that contract is departed from.—19. The plaintiff sued in assumpsit for work and labor, and at the trial put in a sealed instrument under which he had agreed to perform the work, by which it appeared that the defendant was bound to pay the price of the work at certain stated periods; the work was not done according to the contract, and the plaintiff consequently sued in assumpsit, but having been nonsuited at the trial on the ground that the covenants in the sealed instrument were independent, and that he could sue for the money although the work was not performed, the Court set the nonsuit aside. *Barton v. Fisher*, iii. U. C. R. 75.

Ejectment—Record against two defendants—Notice of trial to three—Nonsuit.—20. In an action of ejectment brought against two tenants, the landlord obtained leave to join in a defence as a third party, but not availing himself of the order, the plaintiff made up his record against the two tenants alone. He gave notice of trial however, in a cause as against the three: the two not confessing &c., the plaintiff was nonsuited. An application was made in term to set aside the nonsuit, but held, that under these circumstances there was no necessity for setting aside the nonsuit—the Court, however, set aside the nonsuit on terms mentioned in the report. *Doe dem. Murphy v. McGuire et al.*, vii. U. C. R. 405.

Nonsuit against plaintiff a bar to subsequent proceedings.—21. Where a judgment of nonsuit has been entered against the plaintiff, he will not be allowed to take any proceedings in the suit, or to call on the defendant to answer him. *Bays v. Ruttan*, v. U. C. R. 634.

Nonsuit refused, although a deed was pleaded with a profert, and not produced.—22. Where a sealed instrument was pleaded with a profert and produced at the trial, and subsequently in term, but was afterwards mislaid, and on a second trial the defendant agreed to admit the execution, knowing that it had been mislaid, and secondary evidence was gone into, the defendant objected to *that* secondary evidence, but not to *any* secondary evidence—the Court refused to allow a nonsuit to be entered for the non-production of the instrument. *Rowland v. Tyler*, iv. O. S. 257.

NONSUIT (JUDGMENT IN CASE OF).

See JUDGMENT AS IN CASE OF NON-SUIT.

NON TENUIT.

See DISTRICT COURT, 3.—DOWER, II. 10, 17.—REPLEVIN ETC., 2.

NOTARY.

Notice of dishonor.—1. It is no part of a notary's duty to give notice of dishonor of a bill. *Ewing et al. v. Cameron*, Trin. Term, 7 Vic.

Notarial protest—Seal.—2. *Sem- ble*: A notarial protest from Lower Canada, certified by the notary as a true copy from his notarial book, is sufficient without any notarial seal. *Ross et al. v. McKindsey*, i. U. C. R. 507.

NOTICE OF ACTION.

See BAILIFF, 1.—DIVISION COURT, 2. NEW TRIAL, VI. 2.

Under 4 & 5 Vic. ch. 3, sec. 61—Signature of attorney—Statement of place.—1. It is sufficient if a notice of action, under the Division Court

Act 4 & 5 Vic. ch. 3, sec. 61, be signed by the attorney of the party complaining; but the notice is insufficient if it contain no statement of the place where the trespass or injury was committed which is made the subject of the action. *Kimble v. McGarry*, Mich. Term, 7 Vic.

[A party giving a notice of action must state the time and place, as far as he reasonably can. *Martins v. Upcher*, 4 Q. B. 585; and see the cases hereinafter following.]

Statement of place.—2. A notice of action against a magistrate must distinctly specify the place where the action complained of was done. *Madden v. Shewer*, ii. U. C. R. 115.

[Also, see *Croukhite v. Sommerville*, 9, infra.]

Statement of attorney's residence.—3. It must also declare the place of residence of the attorney. The subscription therefore of the attorney at the bottom of the notice in this form, "A. B., attorney for the said C. D., Simcoe, Talbot District," was held insufficient. *Bates v. Walsh*, vi. U. C. R. 498.

Statement of form of action to be brought.—4. In the notice of action given to a magistrate for an act done under the Petty Trespass Act, it is necessary to specify the form of action intended to be brought. *Wadsworth v. Mewburn*, Trin. Term, 5 & 6 Vic.

Notice and process by one attorney—Declaration by another.—5. It is no ground of objection to a notice of action against a magistrate that the plaintiff declares by a different attorney from the one by whom the notice was given and process issued. *McKenzie et al. v. Mewburn*, Easter Term, 6 Vic.

To a person acting as revenue officer.—6. A party who, acting as a revenue officer or conceiving that he has authority so to act, seizes goods, is entitled to notice before action brought, without the necessity of proving his commission or appointment. *Wadsworth v. Murphy*, i. U. C. R. 190.

Question for jury in determining right.—7. If an action be brought against a person who is a magistrate, for an act done as he alleges in the execution of his duty, and it be doubtful whether it was so done or not, and no notice of action be proved, it is proper, in order to determine whether he be entitled to such notice or not, that it should be left to the jury to say whether he believed he was acting as a magistrate or not; and if they find in his favor on that point, the verdict must be against the plaintiff. *Carswell v. Huffman*, i. U. C. R. 381.

[See further case 10, infra.]

To a person arresting another in the act of stealing.—8. A party arresting another while engaged in the act of stealing his property, is entitled to notice of action under 4 & 5 Vic. ch. 25, sec. 67. *McDonald v. Cameron*, ii. U. C. R. 406.

Statement of place.—9. In the notice of the cause of action required to be served upon a magistrate the place where the plaintiff was imprisoned must be correctly stated; the fact that the injury took place in the same district, though not at the exact place named in the writ, will not make the variance less fatal. *Croukhite v. Sommerville*, iii. U. C. R. 129.

[See instances of the sufficiency of statements of time and place.—*Jacklin v. Fytche*, xiv. M. & W. 381; *Prickett v. Greatren*, 8 Q. B. 1020; *Jones v. Nicholls*, xiii. M. & W. 361.]

To a person acting avowedly as a magistrate.—10. Where it appears, in the course of the plaintiff's evidence at the trial, that the defendant sued in trespass was acting bona fide as a justice of the peace, and the jury, upon that fact being left them by the judge, so find it, the plaintiff must prove that he has given the defendant a month's notice of action; and this proof is necessary, though the defendant has pleaded the general issue simply, without adding "by statute," in the margin. *Marsh v. Boulton*, iv. U. C. R. 354:

Action against a magistrate—Judgment by default—Necessity for proof of notice, &c.—11. In an action against a justice for an act done in the execution of his office, and judgment by default, it is unnecessary to prove notice of action, or that the action was commenced in due time. *Mills v. Monger*, Hil. Term, 6 Wm. IV.

Sufficient, if it appear from the record that the month's notice was given.—12. In an action against a magistrate for an act done in his magisterial character, it is sufficient if it appear by the nisi prius record that a month had elapsed between the service and the filing of the declaration; and if the writ were really sued out before the month expired, it must be shewn by the defendant. *Haight v. Ballard*, ii. U. C. R. 29.

Proof of service.—13. *Held*, that the following evidence of a bailiff, as to the service of a copy of the notice of action against a magistrate:—"He and two other persons held the respective papers while they were read and compared, but having allowed the plaintiff's attorney to keep in the meantime the original, with which the copies were thus compared, and having omitted to place any mark on it by which he could identify it, he could not venture to swear with certainty at the trial that the papers which he served were copies of that document"—was sufficient to go to the jury to prove a service. *Byrnes v. Wild et al.*, vii. U. C. R. 104.

[Also see NEW TRIAL, VI. 2.]

Notice under 4 & 5 Vic. ch. 26, sec. 40.—14. The Court held that this act requires a clear month's notice of action, exclusive of the first and last days. *Dempsey v. Dougherty et al.*, vii. U. C. R. 313.

Proof of trespasses contained in notice.—15. In an action against a magistrate, a plaintiff is not bound to prove every trespass that he has described in his notice; he may prove

what he can, and recover for what he proves, provided it be such an injury as is stated in the notice. *Byrnes v. Wild et al.*, vii. U. C. R. 104.

Form.—16. *Held*, that the following notice of action—"And also for that you, on the day and year aforesaid, with force and arms, &c., at the township of Thorold, did cause the horse upon which the said Joseph Upper was then riding to be seized, taken and led away, and the said Joseph Upper to be obliged to dismount, and give up the said horse, and converted and disposed of the said horse to your own use; and also, for that you caused the saddle and bridle and halter, which were then on the said horse to be seized, taken and carried away, and to be converted and disposed of to your own use, and other wrongs to the said Joseph Upper then and there did, to the great damage of the said Joseph Upper of 100*l.*, and against the peace, &c."—was sufficient to enable the plaintiff to recover from the magistrate the value of the horse, as being the property of the plaintiff. (*Robinson, C. J.*, dissentiente, as to the sufficiency of the notice to sustain the verdict for the value of the horse). *Upper v. McFarland et al.*, v. U. C. R. 101.

NOTICE OF ASSESSMENT.

See COSTS, II. 10, 13.—INTERLOCUTORY JUDGMENT, 7.—NOTICE OF TRIAL, 1, 7, 13.

Service.—1. When a defendant had an attorney on whom service of several papers had been made, the Court set aside an assessment of damages, the notice having been served on the defendant only, and not on his attorney. *Ferrie v. Tannahill*, Dra. Rep. 340.

Short notice.—2. Where a person obtains time to plead on condition of taking short notice of trial, this condition does not compel him to take short

notice of assessment—this further condition should be inserted in the rule. *Wright v. McPherson et al.*, iii. U. C. R. 145.

NOTICE OF DISHONOR

See *BILLS OF EXCHANGE ETC.*, III.

NOTICE OF MOTION.

See *INTERLOCUTORY JUDGMENT*, 7.—*IRREGULARITY*, 12, 16, 20, 21.—*JUDGMENT AS IN CASE OF NON-SUIT*, III. 4.—*NOTICE OF TRIAL*, 8, 14.—*SHERIFF'S SALE*, 8.—*WRITS OF INQUIRY ETC.*, 4.

NOTICE OF TRIAL.

See *COSTS*, II. *passim*.—*JUDGMENT AS IN CASE OF NONSUIT*, I. 8, 9.

Irregularity.—1. Notice of trial, given instead of notice of assessment, is irregular. *Billings et al. v. Reid*, Hil. Term, 6 Wm. IV.

[See case 7, *infra*.]

Verdict set aside for want of.—2. Where a demurrer was taken off the file as a dilatory plea by the order of a judge, and the defendant having pleaded, the plaintiff proceeded to trial without serving a notice but merely informed the defendant that the cause was entered for trial, and afterwards took a verdict, the Court set the verdict aside, the defendant having been entitled to short notice of trial. *Truscott et al. v. Goldie et al.*, Easter Term, 6 Wm. IV.

[See cases 6 and 8, *infra*.]

Service.—3. It is not sufficient to leave a notice of trial in the office of the defendant's attorney; it must be left with some person doing business there. *Brewer v. Bacon*, Mich. Term, 7 Wm. IV.

[So *Gas Company v. Kisoock*, 11, *infra*.]

Leave to plead de novo—*Fresh notice must be given.*—4. Where after issue joined and notice of trial given, the defendant has leave to plead de novo, the plaintiff cannot proceed to trial without a new notice. *McMillan v. Fergusson*, Mich. Term, 2 Vic.

Short notice—Computation of time.—5. In computing the time for short notice of trial the first day is exclusive, and the last inclusive; therefore, notice on Saturday for Tuesday is too late. *Love v. Armour*, Trin. Term, 3 & 4 Vic.

[If a person avail himself of the terms of a short notice, he cannot afterwards countermand it. *Doncaster v. Cardwell*, ii. M. & W. 390.]

Several defendants—Death of some—Suggestion—Notice against all.—6. Where there were several plaintiffs and defendants in a cause, and one of the plaintiffs and one of the defendants died, and their deaths were suggested on the record, but notice of trial was given in the names of all the parties, as if they had been living, but the defendants' attorney did not return the notice, nor express any intention of moving to set aside the proceedings for irregularity, the Court refused to interfere to set aside the verdict. *Bell v. Graham et al.*, ii. U. C. R. 37.

Issues in law and fact—Notice.—7. Where there are issues in fact and in law, a notice of trial only is sufficient to enable the plaintiff to assess his contingent damages. *Davis v. Davis*, Mich. Term, 6 Wm. IV.

[Also case 13, *infra*.]

Setting aside verdict for want of notice—Notice of motion.—8. Where a notice of trial is not shewn to have been served, no notice of intention to move against the verdict can be required, and the verdict may be set aside without an affidavit of merits. *Consumers' Gas Company v. Kisoock*, v. U. C. R. 542.

[Also case 13, *infra*.]

Affixing notice in office of deputy clerk of the Crown.—9. A copy of

a notice of trial can only be affixed in the office of the deputy clerk of the Crown in the district in which the action is brought. When, therefore, a testatum writ only had been issued into the district where the notice had been put up, the notice of trial was held to be irregular. *Chase v. Gilmour*, vi. U. C. R. 604.

Usual terms—Short notice—Service.—10. Where a defendant obtains time to plead on "the usual terms," he is bound to take short notice of trial. A notice of trial not addressed to the defendants' attorney, but served upon their town agent, with information for whom it was intended—*Held*, a sufficient notice, *Senior v. McEwen et al.*, ii. U. C. R. 95.

[See also case 15, *infra*.]

Left at an office of the attorney.—11. Leaving a notice of trial at an office of an attorney is not a service, unless it is sworn to have been given to some person there. *Consumers' Gas Company v. Kissock*, v. U. C. R. 542.

Partners—One signs notice, the other appearing on the record.—12. *Semble*: That a notice of trial cannot be said to be irregular because A., one of two partners, as attorneys, signs the notice of trial as the plaintiffs' attorney, although B., the other partner, appeared as the attorney on the record, there having been no order to change the attorney. *Gamble et al. v. Rees*, vii. U. C. R. 406.

To try issues and assess damages when no issues in fact.—13. Where the notice of trial is to try the issues and assess the damages, and there are in fact no issues on the record to be tried, the notice of trial as to the assessment is not therefore irregular. *Ib.*

Irregularity in date—How cured.—14. A notice of trial naming Friday the 19th of May, instead of Friday the 18th, is an irregular notice; but if the defendant intend to rely upon it as such he must give notice to that effect

to the plaintiff before the trial, otherwise the irregularity will be cured. *Gordon v. Cleghorn*, vii. U. C. R. 171.

Service on an agent.—15. *Semble*: That the service of a notice of trial upon the agent of an attorney, who is himself the defendant in the action and not representing another, is a good service. *Bank of Upper Canada v. Robinson*, vii. U. C. R. 478.

Managing clerk accepting notice nunc pro tunc without the knowledge of the principal.—16. A managing clerk in an office has power to bind his principal by accepting a notice of trial as of an earlier date than it was actually delivered, unless the principal promptly repudiate the acceptance, and give notice thereof to the opposite party. *Orr v. Stabback*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

NOTICES (VARIOUS).

See AGREEMENT, 4.—ARBITRATION AND AWARD, V. 3, 5; VI(2), 4, 18; VIII. 1.—ARREST, II. 16.—BANKRUPT ETC., 13, 14.—DEMURRERS, 17.—DISTRESS, I. 15.—DISTRICT COUNCIL, 10.—INDEMNITY BOND, 3.—INDIAN LANDS, 2.—INSOLVENT ETC., 20, 21.—PATENT, 2.—SET-OFF, 2.—SHERIFF, I. 8, 9. TERM'S NOTICE.—TROVER, 1. 4.

NOTICE TO ADMIT DOCUMENTS.

See BOND, II. 10.

NOTICE TO APPEAR.

See EJECTMENT, II. 7, 8; III. 10.

NOTICE TO PRODUCE.

See EJECTMENT, VIII. 9.—EVIDENCE II. 2, 3.—NEW TRIAL, X. 6.

Clerical error.—1. Where, in an action on the case for a malicious arrest the plaintiff's attorney served the defendant's attorney with a notice "to produce the writ of ca. re. issued, &c., at the suit of A. against the defendant in this cause:" *Held*, that the notice was sufficient to let in secondary evidence, the mistake in using the word "defendant" for "plaintiff," being a mere clerical error, which could not mislead. *Wilson v. Gilmour*, v. U. C. R. 212.

Sufficiency of service as to time.—2. The sufficiency of a notice to produce, with respect to the *time* of service, seems to rest with the judge presiding at the trial. *James v. Mills*, iv. U. C. R. 366.

[So per Parke, B., in *Lloyd v. Mostyn*, x. M. & W. 488. See further, cases 5 & 6, *infra*.]

3. *Quære*: Can a notice to produce be served on the agent of the defendant's attorney? *Ib*.

4. *Quære also*: Has the plaintiff a right to call on the defendant's attorney in Court, to say whether he has or has not the document (a writ in this case) in his possession? *Ib*.

Sufficiency of time—When notice dispensed with.—5. In an action of trespass against commissioners of a court of requests for seizing the plaintiff's property under an illegal execution, said to have been issued by them, a notice to produce the writ served on their attorney four days after the commencement of the assizes, the defendants living more than ninety miles from the assize town, was held insufficient: *Held also*, that the necessity for the notice being given was not removed by the writ being pleaded in justification, the general issue being also on the record. *McCrae v. Osborne et al.*, Easter Term, 7 Vic.

6. Where the defendant residing in the assize town, was served upon Saturday with a notice to produce a document in his possession on the following Monday: *Held*, that the notice

was served in sufficient time. *Robertson v. Boulton*, Hil. Term, 6 Vic.

NOTICE TO QUIT.

See EJECTMENT, I. *passim*.

NUISANCE.

See GAS COMPANIES, 1.—HIGHWAY, 1, 2.—PLEADING, II. 36.—WATER, 4.

Abatement of nuisance by a private person—Excess.—1. A person who takes upon himself to abate a nuisance, for instance, a mill dam, may be called upon to pay damage for any injury done to the plaintiff's property beyond what was necessary for removing the public inconvenience. *Truesdale v. M^r. Donald*, Tay. U. C. R. 153.

Action by reversioners—Damages.—2. In an action on the case by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate to the injury which the plaintiffs may sustain by the possible continuance of the nuisance. *Drew et al. v. Baby*, i. U. C. R. 438.

Reduction of verdict on abatement of nuisance—Release.—3. Where in an action on the case for a nuisance by landlords as reversioners they recovered 250*l.* damages, the Court granted a rule nisi to reduce the verdict to one shilling on the nuisance being abated within a certain time, unless the landlords obtained a release from their tenants to the defendant of any cause of action accruing to them from the nuisance. The rule was afterwards discharged on a release being produced, although the release was not exactly in accordance with the terms of the rule. *Drew et al. v. Baby*, Mich. Term, 5 Vic.

Quære: Whether the Court had power to make the rule absolute? *Ib.*

Declaration.—4. *Semble*: That a declaration would be good in charging, in general terms, the defendants with causing offensive vapors to arise &c., without assigning the particular cause of the vapors. Were it however a good ground of special demurrer, the defect would be cured by the plea undertaking to describe the causes &c., and to justify them. *Watson v. Gas Company*, v. U. C. R. 262.

NULLITY.

See ABATEMENT, 3.—APPEARANCE, 4, 5, 6.—ARREST, I. 24.—BAIL, III. 2.—CAPIAS AD SATISFACIENDUM, 13.—DEMURRERS, 5.—ESCAPE, 23, 24.—EXECUTION, 8.—INTERLOCUTORY JUDGMENT, 3, 4, 8. JUDGMENT, 10 11.—JUDGMENT AS IN CASE OF NONSUIT, IV. 4, 5, 6. MANDAMUS, 13.—PRACTICE, I. 4.

Filing declarations.—A declaration filed before the return of the writ and the affidavit of service filed is a nullity, as well as a declaration filed more than a year after process is returnable. *Forrester v. Graham*, ii. O. S. 369.

NUL TIEL RECORD.

See BAIL, II. 4, (latter part).—COSTS, IV(2), 2.

When plea of, served, issue is joined—Demurrer.—1. Upon the plea of nul tiel record being pleaded by the defendant the issue is complete, and it is unnecessary for the plaintiff to reply; but if he should do so and pray an inspection, and the defendant should demur on the ground of informality, though the replication be unnecessary, the defendant might have judgment on demurrer. The demurrer to the replication in this case was held bad, the grounds taken being insufficient. *Grantham v. Jarvis*, vi. U. C. R. 511.

Amendment of declaration after issue joined on.—2. After issue joined on nul tiel record, and a trial, the Court permitted the plaintiff to amend his declaration. *Church v. Barnhart*, Dra. Rep. 456.

NUNC PRO TUNC PROCEEDINGS.

See JUDGMENT, 20.—NOTICE OF TRIAL, 16.—PRACTICE, II, 7.

NUNQUAM INDEBITATUS.

See PLEADING, VIII. 6.

OFFICES (SALE OF).

See BOND, I. 11.

ONTARIO (LAKE OF).

See WATER, 4.

ONUS PROBANDI.

See ATTORNEY, III. 3.—BILLS OF EXCHANGE ETC., VI. 4.—COVENANT, II(2), 12.—INDEMNITY BOND, 6.

Under 7 & 8 Wm. III.—1. Where a vessel is seized as not being British built, under the provisions of the statute of 7 & 8 Wm. III., the onus probandi lies upon the claimant—i. e., to recover, he must prove that the vessel in question was built at a British port. *Rex v. Nash*, Tay. U. C. R. 259.

Assumpsit—Plea, autre action—Onus on defendant.—2. Where, in assumpsit, the defendant pleaded that the plaintiff had implead him in a former action on the same promises, and that the defendant had in that action recovered judgment, to which the plaintiff replied, that the action in which the

judgment was recovered was not on the same promises; it was held that the issue was on the defendant, and that he must prove the record of the former recovery. *O'Neill et al. v. Leight*, iii. U. C. R. 70.

Covenant for title—Plea, seizin—Onus on defendant.—3. Where to a declaration in covenant for title generally, and a breach that defendant had no title, the defendant pleaded a seizin in fee: *Held*, that the issue lay upon him, and that he must shew such seizin by proof of actual possession at some time as prima facie evidence of his estate in fee, although the plaintiff offered no evidence in support of his breach. But the rule is otherwise when the covenant is only against the party's own acts. *McKinnon v. Burrows*, iii. O. S. 114.

[Upheld in next case.]

4. In an action on a covenant for title where the defendant pleads that he was seized in the terms of the covenant, the onus of proof lies upon him, and the plaintiff need not first give evidence of a breach to entitle himself to a verdict. *Lemesurier v. Willard*, iii. U. C. R. 285.

Prima facie right to inherit made out by plaintiff—Proof of nearer heir on defendant.—5. Where the lessor of the plaintiff in ejectment, capable of inheriting and prima facie entitled to inherit, makes out a reasonable case, the Court will throw upon the defendant, especially if he be a stranger to the title, the onus of shewing a nearer heir. Where, for instance, the lessor of the plaintiff claims by descent as the brother of an elder brother dying without issue, proved by persons connected with the family "that they had heard of the elder brother's marriage many years ago, but knew nothing of his having any issue"—the Court held this evidence sufficient, in the absence of any proof to the contrary, to entitle the lessor of the plaintiff to recover.

Doe dem. Place et al. v. Skae, iv. U. C. R. 369.

Ejectment—Onus to shew 4 Wm. IV. ch. 1 inapplicable.]—6. In an ejectment the burden of proof to shew that the statute 4 Wm. IV. ch. 1, sec. 17, is inapplicable is thrown upon the defendant. *Doe dem. McKay v. Purdy et al.*, Easter Term, 4 Vic.

Action on a note—Plea, no consideration—Onus on defendant.—7. In an action on a promissory note the defendant pleads no consideration, upon which issue is joined, the defendant must impeach the consideration; and it is not necessary for the plaintiff to prove the consideration in the first instance. *Sutherland et al. v. Patterson*, Mich. Term, 6 Vic.

ORDNANCE DEPARTMENT.

Contract entered into with a commissariat officer — Action thereon against ordnance department.—1. The plaintiffs tendered for the construction of a lake wall in front of the barracks above Toronto on the shore of Lake Ontario, and their tender being accepted by the commissariat officer at Toronto, an agreement was executed between the plaintiffs of the one part, and "assistant commissary general Thompson, acting on behalf of Her Majesty, her heirs and successors," of the other part, whereby the plaintiffs engaged to execute the work according to their tender, and in conformity with the plans and specifications in the commissariat office, to which all the parties attached their signatures "preparatory to their being lodged with the royal engineer department for the guidance of all concerned," and it was stated in this contract that the "plaintiff should be entitled to receive from Her Majesty's government for the performance of the said works to the satisfaction of the royal engineer department, the sum of 2786*l.* 7*s.* 11*d.*

currency, to be paid by the ordnance department by draft on the military chest, payable in bank notes or specie at the option of the commissariat department. The plaintiffs under this contract, upon the authority of the provincial act 7 Vic. ch. 11, sued the principal officers of Her Majesty's ordnance on the common counts for certain extra work. *Held*, that this was an agreement between the plaintiffs and the commissariat department, and that therefore the plaintiffs had no right of action under the statute against these defendants. *Quære*: Suppose the contract had been clearly made between the plaintiffs and the ordnance department, could the plaintiffs have recovered against the defendants under the 30th clause of the provincial act 7 Vic. ch. 11? Can the provincial parliament constitutionally give a right of action against the Board of Ordnance, a military department of the Imperial government? *Quære also*: Does the 30th clause, assuming it to be constitutional, give a right of action against the ordnance department upon an implied, as well as upon an express contract? *Tully et al. v. The Principal Officers of Her Majesty's Ordnance*, v. U. C. R. 6.

7 Vic. ch. 11, sec. 30—*Actions*.]—
2. The statute 7 Vic. ch. 11, sec. 30, enables the principal officers of Her Majesty's ordnance to sue in their corporate capacity for the price of ordnance stores sold by them before the passing of that act. *Principal Officers of Her Majesty's Ordnance v. Johnson*, i. U. C. R. 198.

7 Vic. ch. 11, sec. 4—*Leases &c.*]—
3. The 4th clause of the Ordnance Vesting Act, 7 Vic. ch. 11, only protects persons who at the time of the act passing held an assurance derived under the officer in charge of the ordnance, of some certain or existing estate or interest in any portions of the lands about to be vested in the ordnance; a party, therefore, who produced merely a written receipt of rent

from the ordnance officer, but could not shew any lease in existence at the time of the land being vested in the ordnance, or that a term had ever been created, was held not to come within the protection of the act. *Doe dem. Mosgrove v. L'Esperance*, vii. U. C. R. 343.

OVERHOLDING TENANT.

See COSTS, VII. 6.—EJECTMENT, I. 10.—LANDLORD AND TENANT, II. 2, et seq.

OYER.

See ARBITRATION AND AWARD, VI(2), 10.

Held, that an (L. S.) need not be inserted in a deed set out upon oyer. *Moffatt et al. v. Loucks*, Tay. U. C. R. 416.

[Also, see PROCESS, 9.]

PARENT AND CHILD.

See GUARDIAN.—HUSBAND AND WIFE, 5.—INFANT, 20.—LIMITATIONS (STATUTE OF), II. 19.—MASTER AND SERVANT, 2.—PARTNERS ETC., 11. SEDUCTION.—TRESPASS, I. 20.

1. Application to the court, as against the mother, by the father, for the custody of his child.—*Quære*, the kind of application the father had better adopt to bring the matter fully before the court. *Regina v. Sheriff*, vi. U. C. R. 197.

Father's right to custody of child—Order of court, how obeyed by mother.]

—2. The order of this court, commanding the wife to deliver to the husband the body of their child, is sufficiently complied with by the wife placing the child in the charge of the husband. If the child return of her own will to the mother, and is not afterwards forcibly detained, the Court will not further interfere. *Ib.*, vii. U. C. R. 403.

PARLIAMENT.

See ELECTIONS.—MANDAMUS, 3, 14.
SHERIFF, II. 7.—WITNESS, 2.

Power to imprison for contempt.]

1. The House of Assembly has the power of imprisoning persons guilty of contempt in answering or refusing to answer questions before a select committee. *M'Nab v. Bidwell et al.*, Dra. Rep. 152.

Action against a member—Proceedings.]

2. A member of the Provincial Parliament must be sued by bill and summons, and not by capias. *Phelps v. McKenzie*, Hil. Term, 6 Wm. IV.

3. A member of the Assembly is entitled to the privilege of being sued by bill and summons from the moment of his election, and a writ of ca. re. issued against him on the day of his election, is irregular. *Watson v. Ermatinger*, i. U. C. R. 334.

Proceedings, when sued with others.]

4. A legislative councillor should be proceeded against by bill and summons, although he be sued jointly with others; and if he be sued by capias, the motion should be to set aside the writ as to him, and not to set aside the service. *Hincks v. Crooks et al.*, Easter Term, 2 Vic.

Original summons to warrant testatum.]

5. The Court gave leave to issue an original summons, to warrant a testatum issued against a member, after motion to set the proceedings aside for irregularity. *M'Koane v. Fothergill*, Tay. U. C. R. 481.

Variance between bill and declaration.]

6. In an action against a person having privilege of parliament, the declaration will not be set aside for a variance between it and the original bill in a material allegation. *Hill v. McNab et al.*, i. U. C. R. 413.

Teste of summons.]

7. There must be eight days between the teste and return of a writ of summons sued out

against a member of parliament. *Lyster v. Boulton*, v. U. C. R. 632.

PAROL EVIDENCE.

See EVIDENCE, I.

PARTICULARS OF DEMAND.

See JUDGMENT OF NON PROS., 1.—
NONSUIT, 10.

Stay of proceedings.]

1. After a demand made and sworn to, the Court made a rule for particulars of demand to be delivered, and to stay proceedings in the mean time, absolute in the first instance. *Butler v. Richardson*, iii. O. S. 605.

[See case 10, infra.]

In debt on bond.]

2. In debt on a bond to the limits, a rule for particulars of the breaches will be granted. *Church v. Barnhart*, Dra. Rep. 223.

Time to plead.]

3. The defendant has the same time to plead after the delivery of particulars under a judge's order, as he had when the summons was returnable. *Washburn v. Fothergill*, Dra. Rep. 489.

Judgment of non pros.]

4. After the defendant has obtained a rule for particulars, and the plaintiff has not delivered them, the Court will grant a rule that, unless the plaintiff shall deliver them within a certain time, the defendant shall be at liberty to sign judgment of non-pros. *Shaver v. Correy*, Hil. Term, 3 Vic.

[See JUDGMENT OF NON PROS, 1.]

Promissory note.]

5. Where a promissory note is declared on, an error in its date when given in a bill of particulars under a judge's order is immaterial. *Barney v. Simpson*, Hil. Term, 3 Vic.

6. A promissory note declared on need not be mentioned in a bill of particulars. *Street v. Cameron*, Hil. Term, 2 Vic.

[See NONSUIT, 10.]

7. *Semble*: Particulars delivered after summons, but without any order for their delivery, do not bind. *Ib.*

In trespass.—8. A defendant in trespass may obtain particulars of the plaintiff's cause of action before declaration. *Nevills v. Hervey*, Trin. Term, 3 & 4 Vic.

Evidence under bill of particulars for work and labor.—9. Under a bill of particulars for work and labor, the plaintiff may give in evidence an acknowledgment of a specific balance due for work and labor. *Drummond v. Bradley*, Dra. Rep. 254.

Order with stay of proceedings.—Arrest made after such order.—10. After the service of non-bailable process, a judge's order obtained by the defendant for the delivery of particulars, with a stay of proceedings, does not operate so as to prevent the plaintiff from arresting the defendant on an alias writ. *Wilson v. Wilson*, iii. O. S. 297.

PARTITION.

See DEED, II. 9.

Affidavit requisite—Must be adverse party.—1. A petition for a partition under 2 Wm. IV. ch. 35 must be verified by affidavit, and there must be an opposing party, although the suit be an amicable one, and one of the parties consenting to the partition has to be dropped for that purpose. *Robinson*, *Ex parte*, Mich. Term, 2 Vic.

Respondent may demur.—2. The respondent to a petition for partition under 2 Wm. IV. ch. 35 may demur to the petition. *Cronk et al. v. Cronk*, i. U. C. R. 471.

No proof that the parties empowered to partition refused to do so—2 Wm. IV. ch. 35.]—3. Where a testator directed in his will that after the death of A. his land should be divided between his children by his executors: *Held*, that

in the absence of any refusal of the executors to make the partition after the death of A., it was not a case in which the Court could direct a partition to be made, under 2 Wm. IV. ch. 35. *Cronk v. Cronk*, Easter Term, 5 Vic.

Parties interested consenting.—4. The Court cannot award a writ of partition, under 2 Wm. IV. ch. 35, where all the parties interested in the partition consent to its being made. *Eastwood et al.*, *In re*, i. U. C. R. 3.

5. The provisions of the statute 2 Wm. IV. ch. 35, as to issuing writs for partition, do not apply to cases where the parties consent to the partition. *Usher*, *In re*, i. U. C. R. 527.

PARTNERS AND PARTNERSHIP.

See ARBITRATION AND AWARD, I. 6; III(1), 2; III(2), 9.—ARREST, I. 18.—ASSUMPSIT, I. 9.—AUCTION ETC., 5.—BILLS OF EXCHANGE ETC., I. 2; IV. 2, 3; V. 5, 7, 34.—EXECUTOR ETC., I. 2.—GUARANTEE, 8.—JOINT STOCK COMPANY.—NOTICE OF TRIAL, 12.—PLEADING, X. 5.—PRACTICE, I. 2.—SHERIFF, I. 10.—WITNESS, 5, 6.

Right of one partner to sign cognovit in the name of the firm.—1. One partner cannot sign a cognovit in the name of the firm without a special authority, and a judgment entered upon such cognovit will be set aside with costs. *Holme v. Allen et al.*, Tay. U. C. R. 479.

[Right of one partner to execute an arbitration bond in the name of the firm—see ARBITRATION AND AWARD, I. 6.]

Cognovit given by one partner collusively.—2. Where one of two partners gave a cognovit for himself and partner, without his partner's concurrence, and colluded as alleged with the plaintiffs to defraud other creditors, and judgment was entered upon it, the

Court, upon strong evidence of collusion, set aside the cognovit and judgment entered thereon with costs. *Joyce v. Murray et al.*, Mich. Term, 6 Vic.

Admission of a balance due by one partner to another after dissolution—Assumpsit.—3. When on a dissolution of partnership one partner has admitted a balance due his co-partner, assumpsit will lie although there be no promise to pay; and in one case, where the balance did not appear conclusively, and the judge at Nisi Prius left it to the jury more unfavorably for the plaintiff than he might have done, and there was a verdict for the defendant, a new trial was granted on payment of costs. *McNicol v. McEwen*, iii. O. S. 485.

[See case 10, *infra*.]

Action by one partner against another for a breach of an agreement.—4. An action cannot be maintained by one partner against another, on an offer to pay a certain sum, if he were allowed to keep the books and collect the debts. *Burgess v. Fanning*, iv. O. S. 188.

Note by partner in name of firm for private debt.—5. A note given by a partner for a private debt in the name of the firm, is not binding on the firm. *Beals v. Sheldon et al.*, Trin. Term, 5 & 6 Wm. IV.

[See PLEADING, I. 3.]

Partners not bound by bill drawn in the name of one.—6. One of several partners cannot bind the firm by a bill drawn in his own name, although for partnership purposes. *Goldie v. Maxwell*, Hil. Term, 4 Vic.

[See BILLS OF EXCHANGE ETC., I. 2.]

Accommodation indorsement on note for benefit of firm, though note drawn by one alone.—7. A. and B., representing themselves as partners, obtained C.'s accommodation indorsement to a note drawn by A. alone, but stated by B. to be drawn for their joint benefit, and on their joint liability; the note was discounted at a bank, and C. was subsequently obliged to pay it, A.

having in the meantime absconded: *Held*, that C. could not recover against B. on the note, but that he might maintain his action on the count for money paid. *Annis et al. v. Lewis*, Trin. Term, 6 & 7 Wm. IV.

Trover by one partner against another.—8. One partner cannot maintain trover against another for converting the partnership property. *Smith v. Book*, Trin. Term, 1 & 2 Vic.

Construction of agreement—Question of partnership.—9. *Held*, upon the construction of the agreement and facts as given in the report of this case, that the defendant, Meritt, in the course of certain transactions between the plaintiffs and defendants, must be considered as a partner, and as such liable for any advances made to the defendants during that period. *Tobin et al. v. Merritt et al.*, ii. U. C. R. 2.

Admission of a balance due by one partner to another before dissolution—Assumpsit.—10. A., one of two partners, makes the following entry in the partnership books: "I have this day (5th April 1841,) examined our books and find them correct, and a balance due my co-partner of 288*l*." No promise to pay the balance is proved by B., the co-partner, and subsequently to that entry the two parties continue the partnership business, and afterwards finally settle and dissolve: *Held*, that B. has no right of action against his co-partner A., upon the balance stated in the entry. *Allan v. Garven*, iv. U. C. R. 242.

Inference of partnership between father and son.—11. Where upon the question of partnership between father and son, (defendants), the jury found for the plaintiff upon the following evidence: That the son, a young unmarried man, lived with his father, was in general occupied with his business, carrying beer to his customers, receiving money and making

payments for him, &c., and had furnished part of the money with which his father had built his brewery: *Held*, that this evidence laid no ground upon which a partnership between father and son could be inferred, and that the defendants were entitled to a new trial on payment of costs. *Sculthope v. Bates et al.*, v. U. C. R. 318.

Payments made for a partnership through the agent of one partner, and afterwards returned by him in satisfaction of the private debt of such partner.—12. A. and B., partners, agree to sell to C. 500 barrels of flour at so much per barrel, to be paid per 100 barrels after the delivery, and upon the production of the wharfinger's receipt. The son of A. (one of the partners) comes to C. with the wharfinger's receipt for 100 barrels, C. gave him a cheque for the amount due in favor of the firm, and took his receipt. As the son was leaving C.'s store, a clerk of his reminded him that a private note of A.'s to C. of 40*l.* was then due and unpaid. A.'s son, with the proceeds of C.'s cheque, took up this note of 40*l.* B., the other partner, in consequence of this application of the money of the firm by A., refused to send C. any more flour till the 40*l.* was made good to him. C. then sued A. and B. and recovered: *Held*, on a motion for a new trial, that the payment to A.'s son under the circumstances was such a payment to the partnership as acquitted C. upon the whole sum paid. *Semble*, that if it could be shewn by B. that C. paid A.'s son upon the previous understanding that A.'s *private debt* was to be retained out of the cheque given by the firm, the son's receipt would not have discharged C. from the payment of the 40*l.* to the firm. *Brunskill v. Chumaskero et al.*, v. U. C. R. 474.

Failure of consideration—Rescission of contract—Money had and received.—13. *Held*, that under all the circumstances of this case, (given in the report), the plaintiff could not bring an

action for money had and received, to recover back the money mentioned in the defendant's receipt, marked B. (Robinson, C. J., dissentiente). *Kay v. Cameron*, v. U. C. R. 530.

What constitutes a partnership inter se.—14. *Held*, that the agreement (given in the report of this case) did not create between the parties a partnership *inter se*, and that consequently the one could sue the other on such agreement at common law, without resorting to equity. *Hawley v. Dixon et al.*, vii. U. C. R. 218.

Debt due by A. and B.—Creditor takes mortgage from A., B. no longer liable.—15. Where there is a simple contract debt due by A. and B., partners, and the plaintiff takes a mortgage from A., giving time, the simple contract debt is thereby extinguished as regards B., and it follows that B. is no longer liable to be sued on the implied *assumpsit*, as having been a joint contractor with A. *Loomis et al. v. Ballard et al.*, vii. U. C. R. 366.

16.]—*Quære*: Where there are partners employed in making engines, &c., and the plaintiff makes an express contract with one of the partners for an engine, can he, notwithstanding such express contract with one only of the partners, sue them all? *Ib.*

PATENT.

Pleading—Effect of de injuria, where right denied.—1. Where in case for the infringement of a patent the defendant pleaded that the invention for which the patent had been obtained was not a new invention, but had been publicly used and vended in a foreign country, the plaintiff replied *de injuria*: *Held*, that the plea was a good answer to the declaration, but that the replication was bad, as the plea was in denial of the right, and not in excuse for its violation. *Vannorman v. Leonard*, ii. U. C. R. 72.

Notice of objections to patentee's right—Particularity.—2. In an action by the patentee against the defendant for an infringement of his patent, upon an order being made by a judge in chambers that the defendant should deliver to the plaintiff particulars of any objections on which he intended to rely in support of his plea, that plea being that the invention was not new but had been wholly and in part used, practised and vended in Great Britain before the grant of the patent: *Held*, that a notice delivered by the defendant to the plaintiff, that he intended to object at the trial to the patent altogether, as being granted for what was not a new invention, was sufficiently particular, and a compliance with the order. *Mills v. Scott*, v. U. C. R. 360.

Pleadings—Meaning of the word "improvement."—3. The plaintiff complained of the defendant having infringed a patent which he (the plaintiff) had obtained for a new and useful mode of generating and distributing heated air in dwelling houses.—Plea, that the plaintiff was not the true and first inventor of the said improvement in the said declaration mentioned, in manner &c.—Demurrer to plea, as bad, in traversing something not alleged in the declaration: *Held*, plea good. *Mills v. Scott*, vi. U. C. R. 205.

PATENT (GRANTING LAND).

See CROWN GRANT.

PAYMENT.

See PRACTICE, II. 45.—PRINCIPAL AND AGENT, 6, 9:—SET-OFF, 1.—WITNESS, 5, 6.

Two distinct accounts—Appropriation of payments.—1. Where a debtor is indebted upon two accounts,

and makes a payment without directing to which account it is to be placed, the creditor has his election to place it to which he pleases, unless there is a specific direction for its application, or circumstances in the case tantamount to one. *Hagerman v. Smith*, Tay. U. C. R. 154.

[See an exception to this rule—*Cummings v. Glassup et al.*, case 4, infra.]

Debt on bond—Pleas of solvit ad diem, and solvit post diem—Evidence thereunder.—2. *Quære*: In an action of debt on bond, where it appeared that there had been extensive dealings between the parties independently of the bond, and that the defendant had sent to the plaintiffs a large quantity of flour which they promised to account for when the price for which it was sold was ascertained, can the defendant under the pleas of solvit ad diem and solvit post diem, give in evidence the value of this flour as a payment on the bond? *Maitland et al. v. Secord*, Dra. Rep. 469.

Party pleading payment of a larger sum, may give evidence of a smaller one.—3. Where payment is pleaded under the rule of Court which directs that all payments shall be specially pleaded, the party pleading payment of a larger sum is not thereby prevented from giving evidence of payment of a smaller sum in reduction of damages, although the issue on the plea must be found against him. *Gooderham v. Chalmers et al.*, i. U. C. R. 172.

Appropriation, when no directions given by debtor.—4. Although it is the general rule in the appropriation of payments, where there are two distinct claims to which they can be applied, that the creditor can at any time make appropriation when the debtor has not directed the money to be specifically applied, yet under special circumstances, the law will sometimes make the appropriation and take the option out of the hands of the creditor.

Cummings v. Glassup et al., i. U. C. R. 364.

[Application of payments on account of a loan—See *Sir James McGregor et al. v. Gaulin et al.*, case 9 infra.]

One sum to several counts.—5. Where a plea of payment of a certain sum is pleaded to two counts, without alleging how much of the said sum is to be paid on each count: *Held*, good on demurrer. *Brown et al. v. Ross et al.*, iii. U. C. R. 158.

In satisfaction of a bond for the performance of something collateral.]

—6. A plea of payment of a sum of money in discharge and satisfaction of a bond conditioned to do a collateral thing is bad, unless it aver that the payment was made after the time for performance was past, and after a breach had been incurred. A loan of money cannot be pleaded in satisfaction and discharge of a bond and condition. *Prindle v. McCann et al.*, iv. U. C. R. 228.

Payment, a condition precedent—Action—Averment of readiness &c.]

—7. Where a payment is to be a condition precedent, or a concurrent act, and is to be made in a certain manner, the plaintiff must aver readiness to pay in the precise manner stipulated. *Tanner v. D'Everado et al.*, iii. U. C. R. 154.

Action on a note, indorsee against payee—Payment by maker by credits in an account.—8. Where A., the indorser of a note sued B. the payee, and it was proved by C. the maker, that the note was made an item in the current account between A. and C. (the maker); that it was long before charged to the maker as a debt due by him, and that when it was so charged the balance was in the maker's favor: *Held*, that upon such evidence the note must be taken to have been paid by the maker. *Held also*, that the note must be considered as paid by the maker as soon as subsequent credits are admitted by A. sufficient to cover

the note, though at the time of the note being charged, the balance was not in C.'s, (the maker's) favor. *McGillivray v. Keefer*, iv. U. C. R. 342.

Appropriation when made on account of a loan.—9. Where the defendant is making payments to the plaintiff on account of a loan, the plaintiff may insist, in the absence of any agreement to the contrary, that the payments be applied in the first place to keep down the interest. *Sir James McGregor et al. v. Gaulin et al.*, iv. U. C. R. 378.

[See the proper method of calculating interest—INTEREST, 2.]

Good notes.—10. *Semble*: That payment in "good notes" does not necessarily mean "good negotiable notes." *McArthur v. Winslow*, vi. U. C. R. 144.

PAYMENT INTO COURT.

Receipt on plea not necessary.—1. According to the practice of this Court, where a defendant pleads payment of money into Court, it is not necessary to obtain the master's receipt for the money in the margin of the plea. *Miles v. Harwood*, i. U. C. R. 515.

Abatement of suit by death of defendant after payment of money by him into Court—Proceedings against his executors.—2. Where the defendant, in an action of assumpsit, paid money into Court and died, and the action abated, and the plaintiff afterwards sued his executors for the same cause of action and took the money in the former suit out of Court, but proved his debt to no larger an amount: *Held*, that he could not retain the costs of the first action and recover against the executors for the difference between the sum remaining and that originally paid in. *Carey v. Choate et al.*, Mich. Term, 6 Vic.

PEDIGREE (EVIDENCE OF).

See EVIDENCE, III. 2.—HEIR, 2.

PENAL ACTION.

See ARREST OF JUDGMENT, 3.—GAMING, 6.—MAINTENANCE, (STATUTE OF), *passim*.—PLEADING, II. 44.

Leave of Court necessary before compromise.—1. The 18 Eliz. ch. 5, prohibits the compromise of a *qui tam* action, without the leave of the Court. *Bleeker v. Meyers*, vi. U. C. R. 134.

[See ASSUMPSIT, I. 15.]

Statute 32 Hen. VIII.—*Leave granted to compromise.*—2. Leave was given to compromise a penal action on the statute 32 Hen. VIII. ch. 8, for buying pretended titles, on paying the Crown's share into Court. *Gray qui tam v. Dettrick*, Hil. Term, 6 Wm. IV.

Nonsuit.—3. In a *qui tam* action the plaintiff may be nonsuited. *Stuart qui tam v. Bullen*, Easter Term, 4 Vic.

PENAL STATUTE.

See GAMING.—MAINTENANCE (STATUTE OF).—USURY.

Construction.—A penal statute is to be construed according to its spirit and the rules of natural justice, not according to its very letter. *Rex v. Mackintosh*, II. O. S. 497.

PENALTY.

Money reserved as liquidated damages, considered a penalty.—1. Where the plaintiff, in an action of debt on an agreement, lays his breach in such a manner as to make it uncertain whether he is not claiming damages in the shape of liquidated damages, by reason of a failure in some very minute particular of the agreement—as if, for instance, the breach complained of was that the defendant did not by the 1st of September clear off all the standing

timber, nor did he fence the said land—the Court will not look upon the sum mentioned in the agreement as anything but a penalty, though the parties have in terms agreed that the sum named should be regarded as liquidated damages, and not as a penalty. *Ainslie v. Chapman*, v. U. C. R. 313.

Such monies being only a penalty, plaintiff not allowed more than actual damages.—2. Where a certain sum is claimed by way of liquidated damages in an action of debt for the non-performance of an agreement, and the Court are of opinion that the sum mentioned is in the nature of a penalty and not of liquidated damages: *Held*, that the statute 8 & 9 Wm. III. ch. 11, will, when such an opinion is pronounced by the Court, restrict the plaintiff from recovering more damages than he has sustained by reason of the breaches; and that a demurrer therefore to the declaration would be bad. *Ib.*

Monies reserved as liquidated damages, only a penalty.—3. *Held*, upon the following clause at the end of an agreement, “and for the performance of this agreement each party binds himself to the other in the penalty of 50*l.* liquidated damages, and not as a penalty, which 50*l.* shall be forfeited by him who fails to perform this agreement, and shall be recovered the one of the other in an action of debt after one month from this date, on default made by either party,” that the 50*l.* was a penalty and not liquidated damages, and that the plaintiff was therefore right in bringing covenant on the agreement, and not debt. *Henderson v. Nichols*, v. U. C. R. 398.

[The cases in which, although the words “liquidated damages” be used and still they are to be taken as a penalty, are those cases where the doing or omitting to do several things of different degrees of importance is secured by the sum named and notwithstanding the language used it is plain from the whole instrument that the real intention was different.—*Price v. Green*, xvi. M. & W. 354.]

4. Where a party binds himself in an agreement to pay the plaintiff 20*l.*, if A. does not fulfil all the covenants and conditions of the agreement, the 25*l.* must be looked on as a penalty, and not as liquidated damages giving the plaintiff an action as for an absolute debt. *McLean v. Tinsley*, vii. U. C. R. 40.

Averments in declaration for liquidated damages.]—5. *Quære*: Where a party, upon an alleged breach of an agreement, seeks to recover compensation not in the nature of general damages to be left to the discretion of the jury, but in the shape of particular damages specially contracted for by the agreement itself, should he not aver in his declaration notice to the defendant before action brought of such particular damages and the amount? *Henderson v. Nichols*, v. U. C. R. 398.

PEREMPTORY UNDERTAKING.

See JUDGMENT AS IN CASE OF NON-SUIT, I. 3; II.

PERJURY.

See BAILIFF, 3.—LIBEL AND SLANDER, II. 7; III(1), 3.

PETTY TRESPASS ACTS.

See APPEAL, 1.—ASSAULT AND BATTERY, 5, 6, 9.—COSTS, VII. 7.—GENERAL ISSUE, 4.—NOTICE OF ACTION, 4, 8.

Semble: That a conviction under 4 Wm. IV. ch. 4 for an act against the public peace does not deprive the party injured of his right to a civil remedy. *DeLong v. McDonell*, Easter Term, 2 Vic.

PHYSICIAN.

See LIBEL AND SLANDER, II. 8.

PLACITA.

See RECORD (NISI PRIUS), 7.

PLEADING.

- I. ARGUMENTATIVENESS.
- II. CERTAINTY AND PARTICULARITY.
- III. COMMENCEMENT AND CONCLUSION.
- IV. CONFESSION AND AVOIDANCE.
- V. DEPARTURE.
- VI. DUPLICITY.
- VII. INCONSISTENCY.
- VIII. MATERIALITY.
- IX. ADMISSIONS.
- X. JOINDER OF COUNTS.
- XI. PLEADING GENERALLY.
- XII. PLEADING IN PARTICULAR CASES.

I. ARGUMENTATIVENESS.

See ARBITRATION AND AWARD, VI (2), 13.—BAILMENT, 3.—CASE (ACTION ON THE), 4.—FALSE IMPRISONMENT, 3.—MESNE PROFITS, 4.—PLEADING, VI. 1, 2, 4.—SHERIFF, V. 14.

Libel — Argumentative justification.]—1. In case for a libel charging the plaintiff with being a “convicted felon,” a plea that in a memorial to the lieutenant governor he had confessed that he had been guilty of bigamy, is bad, as an argumentative and insufficient way of pleading a justification. *Longworth v. Hyndman*, i. U. C. R. 17.

Bill of exchange—Plea denying title thereto—Argumentative replication.]—2. In assumpsit by the indorsee against the indorser of a bill of exchange protested for non-acceptance, the defendant pleaded that before presentment for acceptance the plaintiff had indorsed it to A., who from thence hitherto had been and still is the holder

thereof, and the plaintiff replied, admitting the indorsement to A., but averred that the plaintiff had afterwards been obliged to pay the amount to A., and had taken up the bill from him, and at the time of the commencement of the suit was the true holder: the Court held the replication bad as an argumentative denial of the defendant's plea. *Watkins v. Nicolls*, i. U. C. R. 473.

Action on a note, payee against makers—Argumentative plea by one maker.—3. To an action on a note by the payee against three makers, one of the defendants pleaded that at the time of the making of the said note, he, the said defendant, and the other two defendants were co-partners in the business, and that the other two defendants being indebted to the plaintiff before the partnership, made the note declared upon in the name of all the three defendants for the payment of the said debt, without the assent of him, the defendant, of which the plaintiff had notice &c., concluding with a verification: *Held*, on demurrer to this plea, plea bad, as amounting to a denial of the making of the note, and therefore argumentative. *Semble*: that if the plea had concluded with a traverse of the making of the note by the defendant, it might have been supported. *Gourlay v. Gunn et al.*, v. U. C. R. 566.

Action by school teacher for wrongful dismissal—Argumentative denial.—4. In an action for wrongfully dismissing the plaintiff, a school teacher, a plea averring the dismissal of the plaintiff by a third party authorized by law to do so is bad, being an argumentative denial of the wrong complained of. *Campbell v. Black et al.*, iv. U. C. R. 488.

[Also see div. VI. 1, *infra*.]

Action on a note—Argumentative denial of plaintiff's title thereto.—5. The plaintiff, suing as the holder of a note payable to B. or bearer, avers

that B., the payee of the note, transferred and delivered it to the plaintiff. The defendant pleads, not traversing the fact that B. did assign the note to the plaintiff, but denying it by relating the transaction in a wholly different manner, averring that the plaintiff took the note by delivery from other parties having no connection or interest with B.: *Held*, plea bad on demurrer, as being an argumentative denial that B. assigned the note to the plaintiff. *Smith v. Oates*, iv. U. C. R. 185.

6. Where it is pleaded that both A. (the maker of the note) and the plaintiffs knew, at the time the note was transferred by A. (the maker) to the plaintiffs, that B. the indorser (who had indorsed the note before it was signed by the maker), had only agreed and intended to indorse a note that was made by C., and not one made by A.: *Held*, that such a plea denied in effect the indorsement to the plaintiffs, and was therefore bad, as being an argumentative plea. (Sullivan, J., dissentiente). *Rossin et al. v. McCarty et al.*, vii. U. C. R. 100.

Action for lands bargained and sold—Plea of the Statute of Frauds.—7. In an action for lands bargained and sold, a plea of the Statute of Frauds is bad upon special demurrer, as amounting to the general issue. *Birdsall v. Darling*, ii. U. C. R. 401.

Plea of no contract as required by the Statute of Frauds.—8. A plea that there was no written contract as required by the Statute of Frauds, is bad, as amounting to a denial of the contract. *Dempsey et al. v. Winstanley*, vi. U. C. R. 409.

[Acc. *Leaf v. Tuton*, x. M. & W. 359, and *Turnley v. McGregor*, vi. M. & G. 942.

Plea, disclosing a negative pregnant.—9. Indorsees against the indorsers of a note. The plaintiffs declare on two counts—first, on the note: secondly on an account stated. The defendants plead, “that they did not

indorse the note in the said first count in the declaration mentioned," in manner and form, &c. On demurrer to the plea; it was held bad, because in its mode of traversing the indorsement it contains a negative pregnant, with the admission that one or two of three defendants did indorse. *Commercial Bank v. Reynolds et al.*, iii. U. C. R. 360.

Action by attorney for fees—Plea, a negative pregnant.]—10. To an action brought by an attorney for his fees, a plea that the action was commenced before the expiration of one month after the delivery of any bill, &c., was held bad on special demurrer, as containing a negative pregnant. *Denison v. Donnelly*, ii. U. C. R. 394.

Action on the case—Plea amounting to general issue.]—11. The declaration complained that the defendant, contriving and intending to injure him, caused his (the plaintiff's) horse to be driven upon certain premises not the plaintiff's and without his knowledge, by means whereof the plaintiff's horse was then distrained for rent due in respect of the premises, and which rent the defendant then knew was in arrear; and that his horse being distrained was sold, and so became lost to the plaintiff.—Plea, that the defendant received the horse from the plaintiff's bailee, and returned him to him, which returning the horse was the same grievance of which the plaintiff complained: *Held*, on demurrer to plea, plea bad, as amounting to the general issue of not guilty. *McAnany v. Meyers*, v. U. C. R. 587.

Trespass quare clausum fregit—Plea amounting to general issue.]—12. In trespass quare clausum fregit et de bonis asportatis, a plea justifying an entry and seizure under an attachment against the real and personal estate of a stranger is bad, as amounting to the general issue. *Green v. Hamilton*, Easter Term, 3 Vic.

Assumpsit—Plea amounting to general issue.]—13. An agreement made to tow the plaintiff's schooner when requested, without stating such agreement to be limited in its duration, and breach assigned in not towing in the year 1843.—Plea, that the agreement was made to be in force for the year 1842, and no longer, and that the defendant towed at all times in that year when requested.—Whether such plea is bad as amounting to the general issue, see *Bunnell v. Cane et al.*, i. U. C. R. 116.

Action for breach of an agreement—Plea, amounting to general issue.]—14. The plaintiff declared setting out an agreement dated on 27th November, on the part of the defendant, that he would, on the next day, tow his (the plaintiff's) scow from the Bay of Quinte, near Adolphustown, to Kingston, without any qualification or reservation whatever. The defendant, in his plea, admitted the agreement as set out by the plaintiff, but afterwards averred that the agreement was not so precise and absolute in effect, and then alleged certain facts to qualify it—to this the plaintiff demurred, as amounting to the general issue—judgment was given for the demurrer. *Dorland v. Bonter*, vii. U. C. R. 23.

Action on note—Plea, failure of consideration, title to land for which note given being bad.]—15. To an action on a promissory note, the defendant pleaded that he made the note on account of payment of a piece of land which the plaintiff then agreed to sell and convey to him, and to which the plaintiff then professed to have a title; whereas, the plaintiff had not then, or at any time afterwards, any right in or to the said land, and could not, and did not convey the same to the defendant pursuant to the agreement, and that there never was any consideration for making the said note, except as aforesaid: *Held*, upon demurrer to plea,

plea bad. *Blanchfield v. Birdsall*, vii. U. C. R. 141.

Trespass quare clausum fregit—Argumentative plea of not possessed.]—16. To an action of trespass for breaking down and entering the plaintiff's close, and pulling down the fences &c., the defendant pleaded that he was lawfully possessed of a close next to the plaintiff's close described in the plaintiff's declaration, which close of the defendant the plaintiff claimed as part of his close mentioned in the declaration, and so claiming it as his, wrongfully put up a fence there, and that the defendant took up the fence posts wrongfully incumbering his close, and removed them to a convenient distance, as he lawfully might &c.: *Held*, on demurrer to this plea, plea bad, as being an argumentative plea of not possessed. *Rees v. Dick*, vii. U. C. R. 496.

Assumpsit—Argumentative and immaterial pleas.]—17. Where A. in consideration of B.'s advancing money to C., guaranteed that B.'s acceptance of C.'s drafts should be covered by consignments of flour, together with commission, and in an action against A. for non-fulfilment, he pleaded in his fifth plea that before the maturity of the drafts, which amounted in all to 1500*l.*, the plaintiffs *did receive* from B. *to cover the same*, sundry large quantities of flour, amounting in the whole to 990 barrels, and did sell the same for a large sum, namely, 1657*l.* 5*s.* 9*d.*, and *much more than sufficient* to cover the said drafts so accepted &c., and the said commission in the declaration mentioned: *Held*, on demurrer to the plea, plea bad, in not averring directly that the plaintiff B.'s advances *were covered*, together with commission; and also, in tendering an immaterial issue, in pleading that flour was received *much more than sufficient to cover &c.* *Le Mesurier et al. v. Sherwood*, vii. U. C. R. 530.

II. CERTAINTY AND PARTICULARITY.

See ADMINISTRATION BOND, 2, 3, 4. BILLS OF EXCHANGE ETC., IV. 1, 2; V. 5, 6, 30, 31, 32, 34, 35; VI. 9.—BOND, II. 6, 7, 18, 21, 23.—CARRIER, 19.—COMMON SCHOOLS, 4, 6.—EXECUTOR ETC., III. 13.—FALSE RETURN, 5, 6.—FOREIGN JUDGMENT, 14.—GUARANTEE, 6.—INDEMNITY BOND, 8, 9.—LIMITATIONS (STATUTE OF), IV. 6.—MAINTENANCE (STATUTE OF), 19. PLEADING, III. 7.—SHERIFF, III. 6; V. 5, 7, 14.—TRESPASS, II. 5, 12, 16, 17, 24.—TROVER, II. 1.

Debt on bond—Plea that a conveyance was not made according to agreement, without stating what the agreement was.]—1. Where to a declaration in debt upon bond the plea stated that the plaintiffs had not made a conveyance *according to the agreement*, the plea was held bad on special demurrer, for not shewing what the agreement was, although the agreement was referred to, and its contents might be collected from the condition of the bond as set out upon oyer. *M'Gilvray et ux. v. McDonnell*, Tay. U. C. R. 176.

Use and occupation—averment implying consent of plaintiff to occupy.]—2. In an action of assumpsit for use and occupation, an averment that one A. occupied the premises at the special instance and request of the defendant, was held to imply a sufficient allegation of a permission by the plaintiff to occupy, on a motion in arrest of judgment after judgment by default. *Moffat v. M'Crae et al.*, Dra. Rep. 10.

Debt on bond—Averments in declaration varying from the terms of the bond.]—3. In debt on a bond conditioned on delivery of good *merchantable* grain to deliver a certain quantity of whisky, an averment in the declaration of a delivery of good *distillery* grain, but that the defendants did not deliver the whisky, was held bad on

general demurrer. *Cowper v. Fairman et al.*, iii. O. S. 568.

[See further examples of this kind—INSURANCE, 2.—PATENT, 3.]

Trespass for taking goods—Description of goods in declaration—Plea.—4. In trespass for taking goods &c., if they be not specifically set out in the declaration, it will be bad on general demurrer; and a plea justifying the taking of the goods of A. under an execution against the goods of B., and that divers goods of B. were in the possession of A., without averring them to be the same goods, is bad on special demurrer. *Friesman v. Donnelly et al.*, Hil. Term, 6 Wm. IV.

Action for malicious arrest—Averment of indorsement of writ under the order.—5. In an action on the case for a malicious arrest under a judge's order, an averment in the declaration that the defendant maliciously obtained the order and indorsed the writ of *capias ad respondendum* for bail, shews sufficiently that the writ was indorsed under the order. *Burnside v. Wilcox*, Trin. Term, 1 & 2 Vic.

Action on an administration bond—Insufficiency of breaches.—6. Where the plaintiff declared in debt on bond "as governor general of Canada and judge of the Court of Probate in that part of the province of Canada formerly constituting Upper Canada," on a bond made by the defendants to "Sir John Colborne, at the time of the execution thereof being lieutenant governor of the province of Canada and judge of the Court of Probate therein, and to his successor and successors in office," and assigned as a breach the non-payment of the penalty to the said "Sir John Colborne or any other person or persons whomsoever," whereby an action had accrued to the plaintiff as "governor general of the province of Canada, judge of the Court of Probate therein, and successor of Sir John Colborne," the declaration was held bad on spe-

cial demurrer for not shewing when or where the plaintiff became successor of Sir John Colborne, for not negating payment of the penalty to the plaintiff, and for averring that the action had accrued to the plaintiff "as governor general of Canada, and judge of the Court of Probate." *Bagot v. McKenzie*, Mich. Term, 7 Vic.

Action for hire of a steamboat—Insufficiency of plea excusing non-payment.—7. The plaintiff declared in covenant on an agreement entered into by the defendant for the hire of a steamboat, for which certain sums of money were to be paid by instalments, and it was provided that the defendant should run only on the still water of the lake and river, should employ an experienced and competent captain, mates and engineers, and a sufficient number of competent persons to manage her, that he should not run her at any season not proper for her, and should lay her up carefully when the season required it, and that if from fire or the act of God, or any other cause than carelessness or bad management on the part of the master or hands on board of the boat, she should be lost during the term she was hired, then the instalments should not further be paid; and the plaintiff assigned a breach in the non-payment of 1250*l.*, the instalment due on the 1st December 1842. The defendant pleaded that before that sum became payable, the steamboat from a certain cause other than carelessness or bad management on the part of the master or hands on board—to wit, because she was run against, run foul of and run into by a certain schooner called the *Canada*, and became, and was sunk and wholly lost, of which the plaintiff had notice, and the defendant was thereby discharged. The Court held this plea bad, because the accident was not so described in the plea as to except the master and hands on board from being the occasion of the loss. *Counter v. Hamilton*, Mich. Term, 7 Vic.

Action on a bill—Plea, that bill was indorsed by plaintiff to a third party—Replication averring plaintiff to be the holder.]—8. Where a defendant, sued as acceptor of a bill, pleads that after the acceptance by him and upon action brought, plaintiff indorsed and delivered the bill upon a good consideration to a person whose name is unknown to the defendant, and the plaintiff replies that at the commencement of the action he was, and still is, the holder of the bill, not denying expressly the fact pleaded of his having indorsed the bill for a good consideration, the replication was held bad on demurrer. *Morton v. Thompson*, i. U. C. R. 178.

Action on a note—Plea, that note was indorsed by plaintiff to a third party—Replication not denying the third party to be the holder.]—9. To a declaration by an indorsee against an indorser of a note, averring an indorsement from the defendant to the plaintiff, the defendant pleaded that the plaintiff indorsed it to one A., who was still the holder, to which the plaintiff replied, traversing the indorsement to A.; and on demurrer to the replication it was held bad, in not denying that A. was the holder of the note at the time of bringing the action. *The Bank of British North America v. Ainley*, vii. U. C. R. 33.

Covenant for breach of an agreement—Insufficiency of breaches assigned.]—10. The plaintiff declares on a covenant by the defendant to transfer him certain land, to which the defendant was entitled as the son of an U. E. Loyalist, provided the plaintiff, his heirs or assigns should locate the land, perform settlement duties and procure the patent thereof, at his or their own costs, the defendant in his covenant agreeing to furnish the plaintiff, his heirs or assigns, with full power and authority so to do, and then assigns as a breach that from the time of the agreement to the commencement of the action, he (the plaintiff)

has been ready and willing to locate, &c., of which the defendant had due notice, and though often requested, refused to furnish the plaintiff with power and authority so to do. The breach is bad, in not averring a demand of authority to locate, perform settlement duties, &c., with time and place. *Detlor v. Keogh*, i. U. C. R. 226.

Trespass for seizing and selling cattle—Plea, damage feazant—Replication, defect of fences.]—11. Where in trespass for seizing cattle and causing them to be sold the defendant pleaded that the cattle were taken damage feazant, and he proceeded to justify the sale under 1 Vic. ch. 21, and the plaintiff replied that the defendant's fences were defective, and that the cattle escaped from the highway into the close: *Held*, on demurrer to the replication, that it was bad, for not stating that the cattle escaped through the defect in the fences, and that the plea was good, as it shewed a sufficient justification of the seizure, the sale being merely matter of aggravation. *Stedman v. Wasley*, i. U. C. R. 464.

Trespass quare clausum fregit—Averment of time.]—12. Where the plaintiff declared in trespass quare clausum fregit, laying the entry on the close under a videlicet on 10th April 1844, and on divers other days and times, and averred that during the time aforesaid, to wit, on the 10th April 1844, the defendant took and carried away divers goods and chattels, (not averring them to belong to the plaintiff), and the defendant demurred specially because the time of taking the goods was not laid with sufficient certainty—the Court held the declaration good and refused to entertain an objection on general demurrer, that it did not appear that the goods which were complained of as the subject of the seizure were the goods of the plaintiff. *O'Brien v. Harahy*, i. U. C. R. 475.

[Allegations of time—see cases 14, 28, 29 and 38, *infra*.]

Action on note against indorser—Plea of time to maker.—13. A plea of time given to the maker of a note, in an action against the indorser, is bad, unless it expressly shew that when the time was given the plaintiff was the holder of the note. *Commercial Bank v. Johnston*, ii. U. C. R. 126.

Failure in agreement to build a house—Insufficient averment of time and breach.—14. The declaration stated that heretofore, to wit, on the 4th of August 1844, the defendant agreed with the plaintiff to erect and build a certain house, and have it in a tenantable condition by the middle of November then next ensuing, and alleged for breach that the house was not erected, nor built, nor in a tenantable condition by the middle of the said month of November 1844: *Held*, bad on general demurrer, for not shewing that November 1844 was the November next ensuing the making of the agreement. *Ekins v. Evans*, ii. U. C. R. 144.

Assumpsit for non-payment of rent—Insufficient plea of eviction.—15. Where in assumpsit for non-payment of rent according to agreement the defendant pleaded an eviction by a stranger, who he averred entered under a lawful claim derived through or under the plaintiff, the plea was held bad on general demurrer, because it did not shew that the claim might not have been under a title derived from the tenant himself. *McNab v. McDonell*, ii. U. C. R. 169.

Assumpsit for non-performance of an agreement—Insufficient breaches.—16. Where the plaintiff declared in assumpsit on a special agreement for leasing land for ten years, and the agreement, it appeared from the declaration, was to be reduced into writing to make it effectual between the parties, and the plaintiff assigned as a breach that the defendant did not execute the agreement although requested, the declaration was held bad on gene-

ral demurrer, because it did not appear that the agreement was reduced to writing. *Lee v. Purdy*, ii. U. C. R. 193.

Action on note—Impeachment of consideration by non-delivery of certain goods—Omission of request.—17. Where in assumpsit by the indorsee against the maker of a promissory note the defendant pleaded that the note was made and delivered to the plaintiff in payment of 200 hats and caps, to be delivered by the plaintiff to the defendant, and averred that the hats and caps remained undelivered, but did not aver that any request had been made for their delivery—the plea was held bad on demurrer. *Anderson v. Jennings*, ii. U. C. R. 422.

Action on note by indorsee—Omission of allegation of time to indorsement.—18. Where in assumpsit against the maker and indorsers of a promissory note, under the provincial statute 3 Vic. ch. 8, the plaintiff averred that the payee *duly* indorsed the note to the plaintiff, but there was no allegation of time to the indorsement, nor was the word “afterwards” used as given in the form in the statute—the declaration was held insufficient. *Grant v. Eyre et al.*, ii. U. C. R. 426.

[A count for goods sold and delivered, stating that the defendant was, on, &c., indebted to the plaintiff in, &c., for goods sold by the plaintiff to the defendant at his request, without any further allegation of time, was held good. *Lane v. Thelwell*, i. M. & W. 140.]

Assumpsit—Plea of payment into Court, and a set-off—Defective replication of damages ultra, &c.—19. Where in assumpsit the defendants pleaded payment of money into Court as to part, and a set-off as to the residue in the usual form, and the plaintiff replied to the first plea that the defendants were indebted in a greater amount than the money paid, and to the other plea that the plaintiff was not indebted in manner and form, omitting the words “nor is,” both replications were held bad on general demurrer. *Small v. Strachan et al.*, ii. U. C. R. 434.

Board of Police, London—Action on a bond for rent of market let by them—Plea denying their power &c.]

—20. A. upon being appointed clerk of the market to the Board of Police of London, enters into a bond for the payment of a certain sum of money in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for the non-payment of the money, he pleads "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws respecting fees to be taken thereat;" he then avers that the plaintiffs had no such authority, and that on this account the bond is void: *Held*, plea bad in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *The Board of Police of London v. Talbot*, iii. U. C. R. 311.

Plea answering too much.]—21. A plea to a declaration on a promissory note and account stated that the defendant did not make the note in the first count mentioned, is bad on special demurrer, as attempting to answer the whole declaration. *Prout v. Howard*, iii. U. C. R. 38.

22. The plaintiff sues the defendants upon two counts—first, on a promissory note; secondly, on an account stated. The defendants plead that they did not make the note in the declaration mentioned. *Held*, plea bad, as professing to answer the whole declaration, while it in fact answers the first count only. *Rattray v. McDonald et al.*, iii. U. C. R. 354.

23. The plaintiffs declare on two counts—first, on a promissory note; secondly, on an account stated. The defendants plead "that they did not indorse the note in the said first count in the declaration mentioned, in manner and form &c." On demurrer to the plea it was held bad, because, not being limited in the introductory part of it to the first count, it must be taken

as pleaded to the whole declaration, and thus, while professing to answer the whole, it in fact only answers the first count. *Commercial Bank v. Reynolds et al.*, iii. U. C. R. 360.

24. The plaintiffs sue for work and labor, as attornies, in the first count, and then add two counts for money paid and on an account stated, not stating by or with them as attornies. The defendant pleads to the whole declaration as if the plaintiffs had been claiming the money as attornies: *Held*, plea bad. *Baby et al. v. Ardin*, vi. U. C. R. 408.

25. The plaintiff declares on two distinct causes of action; the defendant pleads "not guilty of the said supposed grievances:" *Held*, plea bad on special demurrer. *Ambridge v. Foster*, iii. U. C. R. 157.

[Also see case 27 *infra*; and further see cases of traverses being too small, numbers 39 and 41, *infra*.]

Assumpsit—Plea of satisfaction insufficient in its allegations.]—26. In an action on the common counts, the defendant A. pleads, that it was agreed between the plaintiff B., and the defendant A. and a third party C., that C. should sell to B. all the claim, title and right of pre-emption which C. had to certain land, and that C. should execute a deed at B.'s request to D. in satisfaction of B.'s claim, and then avers that C. did by the procurement of A. at B.'s request, execute a deed to D. of all the title C. had to the land: *Held*, plea bad on demurrer, in not averring that the defendant A. had a certain right and interest in the land, and of a certain value, and that the conveyance to D. was accepted in satisfaction. *Fralick v. Lafferty*, iii. U. C. R. 159.

Pleas answering too much—Plea of leave and license.]—27. The plaintiff declared in assumpsit on an agreement with the defendant to make 100,000 bricks, and then averred that he had made 68,000 of them, and prepared in part 30,000 more, but that

the defendant would not allow him to complete them, but absolutely discharged, hindered and prevented him from doing so. The defendant pleaded, first, that the plaintiff entered upon a close of the defendant to complete the work there, and that the defendant prevented him as he lawfully might, which was the same hindering and preventing; and secondly, that the plaintiff was making the said bricks upon a close of the defendant, and had made 68,000 of them in so bad and unskilful a manner, and was proceeding to make the rest in the same way, and that therefore the defendant did then forbid, hinder and prevent him from making the residue, which is the same hindering and preventing, &c. The plaintiff replied leave and license to the first plea, and demurred to the second, and the defendant demurred to the replication of license. *Held*, that both pleas were bad, because pleaded to the whole declaration and not answering the discharge, and that the replication of leave and license was good. *Toleman v. Crew*, ii. U. C. R. 186.

Assumpsit for breach of a contract—Plea, non-performance by both parties, uncertain.—28. The plaintiff in his declaration charges the defendant with the non-performance of a certain contract; the defendant pleads that the said contract was not duly performed by the said parties, to wit, the plaintiff and the defendant, in manner &c. *Held*, plea bad, in leaving it uncertain which of the said parties had not performed the contract, and in what particular it had not been performed. *Jones v. Hamilton*, iii. U. C. R. 170.

Action on a note, indorsee v. indorser—Plea of payment by maker—Allegation of time.—29. Indorsee against indorser of a promissory note. The defendant pleads that *before* and *at* the time when the note became due and at the time of the commencement of the suit, the plaintiffs, as bankers

and agents, had in their hands divers sums of money of the maker of the note amounting to 500*l.*, and were then indebted to the maker in that amount, and that the maker then directed the plaintiffs to retain to their own use the amount of the said note, out of the said monies, which exceeded the amount of the said note, &c.—Demurrer to plea: *Held*, plea bad, in not averring the particular time when the direction was given. *Bank of Upper Canada v. Lewis*, iii. U. C. R. 325.

Action on a note—Want of excuse for omission of party liable—Presentment—Notice.—30. Indorsees sue the defendants separately as payees and indorsers of a promissory note. The declaration avers a joint indorsement by the defendants, a due *presentment* and *notice*, and the liabilities of the defendants.—Demurrer to declaration—first, because presentment at a particular place is not averred; secondly, because a joint liability is shewn on the face of the declaration, and no excuse alleged for omitting the party jointly liable; thirdly, because *due* notice is not alleged or a special averment of notice with time, &c.: *Held*, declaration good upon the first and second grounds, but bad on the third. *Commercial Bank v. Cameron*, and *Commercial Bank v. Culver*, iii. U. C. R. 363.

Action for assault—Justification under a bailable writ—Insufficient replication of arrest being set aside.—31. Where to an action of trespass for an assault the defendant justified under a bailable writ, and the plaintiff replied that the arrest was ordered to be set aside, without stating *upon what grounds*, and without averring that the arrest so set aside was the same arrest under which the defendant justified: *Held*, on special demurrer, replication bad for both the causes assigned. *Montforton v. Montforton et al.*, iv. U. C. R. 338.

Debt—Plea of a less sum in satisfaction of a greater.—32. The plaintiff declares in debt for 1000*l.* upon three counts, 500*l.* work done, 100*l.* money paid, and 400*l.* account stated, which said sums are to be respectively paid on request. The defendants plead that before any of these causes of action accrued, by an agreement made between them under seal, of which they make profert, the plaintiff agreed to build a house for them according to specifications, that it was stipulated in the agreement that any extra work additional to the specifications should be done under the written instructions and superintendence of their architect, and should be valued by him, and be paid for according to his estimate; that certain extra work was done by the plaintiff under the direction of their architect, which was valued by him as the agreement provided; that “such extra work is the cause of action *in the declaration alleged, and for which this action was brought* ;” that it was duly valued by the architect at 355*l.* 5*s.* 2*d.*, and that before this action was brought they paid to the plaintiff the said sum of 355*l.* 5*s.* 2*d.* “in full satisfaction and discharge of the said extra work, and of all damages and demands in respect thereof, being the said causes of action in the said declaration mentioned.”—Demurrer to plea, that it does, in effect, amount to a less sum being pleaded in satisfaction of a greater: *Held*, plea bad on the exception taken. *Ritchey v. The Bank of Montreal*, iv. U. C. R. 222.

Debt on bond for conveyance of land—Defective plea of a conveyance.—33. Where to a bond conditioned that the defendant should “*well and truly convey* in fee simple to the plaintiff, his heirs and assigns for ever,” the defendant pleads that he did make, seal and execute, a conveyance in fee simple to the plaintiff: *Held*, on demurrer, plea bad, being no answer to the condition. *Prindle v. McCann et al.*, iv. U. C. R. 228.

Action on a contract for delivery of wood—Omission of averments about payment, &c.—34. In an action for the non delivery of wood according to contract, the declaration did not state the price to be paid for the wood, neither did it aver that the wood was to be paid for either on delivery or on a certain day, neither did it aver that the plaintiff was ready and willing to pay for the wood: *Held*, on special demurrer, declaration bad, for the omission of any one of these averments. *Maddock v. Stock*, iv. U. C. R. 118.

Declaration on note—Plea, accord and satisfaction, leaving averments unanswered—Christian names.—35. Declaration, payee against the maker of a note for 50*l.* dated the 24th of December 1844, and payable three months after date. Plea, as to 24*l.* 14*s.* 3*d.* parcel, &c., accord and satisfaction, by the defendant accepting an order on the 6th of March 1847 in favor of J. C. Spragge, as required by the plaintiff; and as to the residue a set off: *Held*, on demurrer to plea, plea bad—first, in leaving unanswered the plaintiff’s claim for damages for non-payment of the amount for which the order was given, during the period of two years or more which had elapsed between the day when the note became due and the time of giving the order; and secondly, in not giving at length the christian names of J. C. Spragge, or stating that he was described in the order as J. C. Spragge. *Playter v. Turner*, v. U. C. R. 555.

[Upon the last point, see *BILLS OF EXCHANGE ETC.*, V. 30, 31, 32, 34.]

Case for a nuisance—Plea, referring to time of plea pleaded, and not to time when action brought.—36. In an action against a gas company for a nuisance, a plea of justification containing the averment that they are now managing their works carefully, and that the vapors complained of unavoidably arise, is bad, as applying the defence to the time of pleading the

pleas, and not to the time of action brought. *Watson v. Gas Company*, v. U. C. R. 262.

Action against husband and wife for not joining in a release of the wife's dower—Intendment as to wife.]

—37. Where the declaration alleges that A., wife of B., "having a lawful right to an estate in dower," refused with B. to execute a release, it will be intended, in the absence of any further averment, that the release was required from A. as the wife of B., and not as the wife of the former husband whom she had survived. *Hoyt v. Widderfield*, v. U. C. R. 180.

Action against school trustees for breach of agreement—Allegation of request, time and place.]—38. The plaintiff charged the defendants upon a special agreement stated to have been made by them as trustees, to furnish with fuel when required the plaintiff, a school teacher, under the act 9 Vic. ch. 29. To this declaration the defendants demurred, because no request, with time and place, had been laid in the declaration to furnish fuel: *Held*, declaration bad. *Anderson v. Vansittart et al.*, v. U. C. R. 335.

Note for 100l.—Damages 200l.—Plea to sum stated in the body of note.]—39. The declaration on a note for 100l., claiming 200l. damages for the non-payment of the note—the defendant pleads as if to the whole cause of action a defence applicable to the 100l. in the body of the note, and not to the 200l. damages: *Held*, on demurrer, plea bad. *Clapp v. Murdoff*, v. U. C. R. 565.

Conveyance of land — Executed and executory considerations—Condition precedent to recovery of purchase money.]—40. The plaintiff stated in his declaration that in consideration that the plaintiff, at the request of the defendant, would (as by the said agreement the plaintiff in fact did,) sell to the defendant certain premises, he, the defendant, undertook

that he would pay the plaintiff for the said premises certain sums of money in good notes, and at the times &c. (as therein alleged.)—Breach, that though the plaintiff was ready to accept the notes, and had performed all things to be by him performed, the defendant had altogether failed in his agreement &c. *Held*, upon demurrer to declaration, declaration bad, in not averring in precise terms that the plaintiff had conveyed the premises &c. to the defendant, or was ready and willing to convey. (Macaulay, J. dissentiente.) *McArthur v. Winslow*, vi. U. C. R. 144.

Trespass—Uncertain plea as to time of trespass.]—41. Where to a declaration in trespass charging trespasses committed on *divers days* &c., the plea answered trespasses committed at the time when &c: *Held*, plea bad on special demurrer. *Rees v. Dick*, vii. U. C. R. 496.

Declaration setting out the consideration—Plea that there was not any consideration.]—42. Where the plaintiff sets out the consideration on which the defendant's promise was made, a plea by the defendant "that there was not at any time any consideration for making the promise," is bad. *Bradford et al. v. O'Brien*, vi. U. C. R. 417.

Declaration—Uncertainty in statement of part of the consideration.]—43. An uncertainty in the statement of a part of the consideration for the defendant's promise with respect only to a part of the plaintiffs' demand does not make the declaration bad on general demurrer. *Ib.*

Assumpsit—Insufficient statement of performance of condition precedent to promise.]—44. Where the declaration lays a promise to have been made in consideration that the plaintiff should forbear to prosecute a *qui tam* action, and yet does not aver that the plaintiff did forbear, the declaration is bad in substance. *Hart v. Meyers*, vii. U. C. R. 416.

III. COMMENCEMENT AND CONCLUSION.

See ARBITRATION AND AWARD, VI (2), 5.—BAIL, II. 4.—EXECUTOR ETC., III. 10.—LIMITATIONS (STATUTE OF), IV. 1.—PLEADING, XI. 3, *infra*.

No ca. sa.—Conclusion.—1. A plea of *no ca. sa.* may conclude to the country. *Hall v. Ruttan*, Mich. Term, 2 Vic.

[Plea of “no bill” in an action by attorneys—See case 9, *infra*.]

Informal conclusion of declaration on bond, for non-performance of an award.—2. Where the plaintiff declared in debt for 1000*l.* and averred a reference to arbitration between the defendant and himself by bonds in a penalty of 1000*l.* each, and set out the award thereon, assigning breaches for non-performance, and concluding, “whereby an action had accrued to the plaintiff to recover the sum of 1000*l.* above demanded,” the declaration was held bad on demurrer, as an informal declaration on the bond of submission. *Simpson v. Mode*, Easter Term, 7 Vic.

Special traverses generally.—Conclusion.—3. A special traverse, since the rules of 5 Vic., though pleaded in an action in which the declaration had been filed at a time when it would not have been affected by their operation, must conclude to the country, and not with a verification. *Strathy v. Crooks*, i. U. C. R. 44.

Commencement and conclusion of replications.—4. It is not necessary that a replication should commence with a *precludi non*, or conclude with a prayer of judgment. *Hamilton v. Davis et al.*, i. U. C. R. 176.

Trespass.—Plea of property.—Conclusion.—5. In trespass for taking goods, a plea that at the time &c. the goods were the goods of the defendant, and not of the plaintiff, is good, but it ought to conclude to the country and not with a verification. *Cargill v. Flint*, i. U. C. R. 49.

Plea professing to answer too much in the commencement.—6. Where in assumpsit against the indorser of a promissory note, and on an account stated, the defendant pleaded to the first count that the note in the first count mentioned was not duly presented, and then pleaded a special plea, applicable only to the first count, but commencing “and for a further plea in this behalf,” and the plaintiff demurred specially, because the plea in its commencement professed to answer the whole declaration, but was an answer only to the first count—the Court held the objection good and gave judgment against the plea. *Wood et al. v. Rogers*, ii. U. C. R. 399.

Assumpsit.—Uncertain pleas.—Informal conclusions.—7. The plaintiffs declare in assumpsit for not paying a bill of exchange which the defendant agreed to accept, payable at Montreal on the 18th of July 1845, in consideration of the plaintiffs’ delivering to the defendant at St. Catharines 10,000 bushels of good clean merchantable fall wheat. The declaration avers the delivery of the said wheat to the defendant at St. Catharines, and that the defendant accepted and received the same. The defendant pleads, secondly, that the plaintiffs did not deliver the said 10,000 bushels of wheat in the first count mentioned, to the defendant, and thirdly, that the said 10,000 bushels of wheat averred to have been delivered by the plaintiffs to the defendant was not, nor is good clean merchantable fall wheat, concluding with a verification—Demurrer to the second plea, because it leaves it uncertain whether the defendant intends to object to the non-delivery of the wheat altogether, or to the non-delivery at the time or place mentioned in the declaration.—Demurrer to third plea, because it should have concluded to the country, and not with a verification, and because it was no answer to the first count. Several grounds of objection

were taken to the sufficiency of the declaration. *Held*, declaration good on general demurrer. *Held also*, second plea good, and third plea bad on special demurrer. *Cook et al. v. Mair*, iii. U. C. R. 478.

Action against executors—Conclusion of declaration.—8. In the concluding part of a declaration against executors, it was averred "therefore an action hath accrued to the plaintiff to demand and have of and from the defendants, executors as aforesaid, &c." This was demurred to on the ground that the averment should have been "to demand and have of and from the defendants, as executors." *Held*, declaration good. *Ferrie v. Jones et al.*, v. U. C. R. 504.

Action by attorney for fees—Plea of no bill—Conclusion.—9. The plea of no bill delivered to an action brought by an attorney to recover his costs, should conclude with a verification. *Denison v. Donnelly*, ii. U. C. R. 394.

Declaration—Conclusion—Prayer for relief.—10. It is a good ground of special demurrer to a declaration that it improperly concludes with a prayer for relief. *Hart v. Meyers*, vii. U. C. R. 416.

Plea in bar—Actionem non—Prayer of judgment.—11. A plea pleaded to part only of the cause of action, if *in bar* to that part, need not commence with the *actionem non* and conclude with the prayer of judgment. *Rees v. Dick*, vii. U. C. R. 496.

Plea not in bar by its express terms—Conclusion.—12. To an action on a promissory note a plea stating that the defendant paid the note on the 31st December 1848 before it became due, when by the declaration it appeared that the note fell due in January 1848. *Semble*, that such a plea not denying in express terms the non-payment as alleged, should conclude with a verification. *Bown v. Hawke*, vi. U. C. R. 275.

IV. CONFESSION AND AVOIDANCE.

See BOND, II. 5.—DE INJURIA, 1.—LIMITATIONS (STATUTE OF), IV. *passim*.—PLEADING, VI. I, 4, 5.

Trespass for assault and false imprisonment—Plea. answering part, without confessing and avoiding the rest.—1. The plaintiff declares against the defendants for an assault, beating, bruising, and ill treating.—A., one of the defendants, justifies, alleging that upon suspicion that the defendant had stolen his goods, he laid his information before a justice of the peace of the Niagara district, who granted a warrant directed to the constable of Thorold in the Niagara district, authorizing him to search the plaintiff's house at the township of Louth, in the said district, for the said goods; that B. another defendant, being the constable of Thorold in the said district, at the request of A., searched the house, found the goods, and arrested the plaintiff at Louth, and at the request of A. carried her before a magistrate. Demurrer to plea: *Held*, plea bad in assuming to answer the whole inquiry complained of, and yet not denying nor confessing and avoiding the arrest. *Jones v. Ross et al.*, iii. U. C. R. 328.

Agreement with a party to return a steamer on a certain day—Plea, that such steamer was re-taken before the day.—2. Where the defendant had agreed to return a steamer chartered on a certain day in good repair, dangers of the lake excepted, it was determined that a plea "that before the day arrived the plaintiff took the boat from the defendant without his consent, and kept her," was a sufficient bar to the action, though the plea did not in express terms confess and avoid the fact of not returning the boat. *Larned v. McRae*, i. U. C. R. 99.

V. DEPARTURE.

See BILLS OF EXCHANGE ETC., V. 33.

1. To debt on an indemnity bond the defendant pleaded non damnificatus, and the plaintiff having replied, shewing how she was damnified, the defendant rejoined that the injury arose through the plaintiff's own fraudulent act.—The rejoinder was held a departure, and bad on general demurrer. *Hamilton v. Davis et al.*, i. U. C. R. 490.

2. Debt on bond against two defendants, conditioned that A. as a bank agent, should account as often as called upon. Pleas, that before action brought A. ceased to be agent, and that while he was agent, he kept all the clauses &c. in the condition; secondly, that A. paid the plaintiff the amount of the penalty in the bond. *Held*, bad on general demurrer, the first plea not answering the condition, and the second not being pleaded as accord and satisfaction, nor any release shewn. *Bank of Upper Canada v. Bethune et al.*, Easter Term, 5 Wm. IV.

3. To an action of replevin the defendant avowed for a distress for rent due to him by one Culhaine on a demise at a yearly rent, of which one year's rent was in arrear on the 1st January 1850. The plaintiff replied to this that the close on which the distress was made and on which the rent accrued was, at the said time when, &c., the close and freehold of him the plaintiff, and not of the defendant.—The defendant demurred to this replication, as containing no answer to the avowry: *Held*, replication bad. *Robertson v. Meyers*, vii. U. C. R. 415.

4. The plaintiff declares in debt on bond for the performance of an award. The defendant pleads *no award* upon the premises.—The plaintiff replies, setting out the award.—The defendant rejoins matter extrinsic of the award, and relies upon it for shewing the award void.—The rejoinder is bad, as being a departure from the plea. *Maxwell v. Ransom*, i. U. C. R. 219.

VI. DUPLICITY.

See BILLS OF EXCHANGE ETC., VIII. 9.—DE INJURIA, 1.—EXECUTOR ETC., III. 10.—PLEADING, VIII. 1, *infra*.

Argumentative and double plea.—

1. To a declaration upon a special count for dismissing the plaintiff, a schoolmaster, from his situation before the end of his term without probable cause, the defendant A. pleads justifying the dismissal, but at the same time averring that B. another defendant made the contract with the plaintiff, and that he, A., *specially approved* of the same: *Held*, plea bad, in not confessing the cause of action, and as amounting to the general issue, and for being double. *Campbell v. Elliott et al.*, iii. U. C. R. 167.

2. To an action upon a note by an indorsee against the maker, who signed the note in his private capacity, a plea setting up a defence of want of consideration for the making of the note as regarded the defendant, together with notice and want of consideration on the part of the indorser, and also setting up the further defence that the defendant made the note as president, &c., of a company, to be binding only upon the company, and on the understanding with the payee that there was to be no recourse upon the defendant, is bad for duplicity: *Held also*, that the plea is also bad as an argumentative denial of the making of the note, and as setting up a verbal understanding contrary to what the maker's signature to the note would import. *Ewart v. Weller*, v. U. C. R. 610.

3. To an action by the payee against the maker of a promissory note, the defendant pleaded that the note was obtained by fraud *and* without consideration: *Held*, on special demurrer, plea bad for duplicity. *West v. Biron* (J. Y.), iii. U. C. R. 291.

[See cases 6 and 7, *infra*.]

4. The plaintiffs sue on a promissory note made by A., payable to B. or

order, indorsed by B. to C., and by C. to the plaintiffs, who sue A. B. and C. jointly, under the statute.—The defendants plead usury, setting forth that the making of the note and the indorsements by B. and C. were all without consideration; that C. indorsed the note and delivered it to A. for A.'s accommodation, and in order to enable him to procure a loan; that A. did make a corrupt agreement with D. for the loan of a sum of money on usurious interest, and gave him his note as security, and that D. afterwards indorsed and delivered the note to the plaintiffs, who gave him no consideration for the note, adding this special traverse, "without this, that the said C. indorsed the said note to the said plaintiffs, as in the said declaration is alleged," and the plea concludes to the country: *Held*, plea bad on special demurrer, as being repugnant, inconsistent and double. *Bank of Montreal v. Humphries et al.*, iii. U. C. R. 463.

5. The plaintiff, the indorsee of a note, declares against the indorser, to whose order the maker had made the note payable.—The defendant is averred to have indorsed the note to the plaintiff.—The defendant pleads by way of special traverse, admitting in the inducement the making and indorsing of the note as in the declaration mentioned, and then sets out a charge of usury between the maker and one A., to whom it averred the maker delivered the note, and that A. afterwards delivered the same to the plaintiff, who received the same with knowledge of the usury, "without this, that the defendant did indorse the said note in the said declaration mentioned, in manner and form as the plaintiff hath above thereof complained against him, and of this the defendant puts himself upon the country, &c."—Special demurrer, that no certain or material issue was offered, or could be taken upon the plea, and that it ought to have concluded with a verification: *Held*, plea

good on the exceptions taken. *Sem- ble*, however, that the plea is bad for duplicity. *Dowling v. Eastwood*, iv. U. C. R. 217.

6. A plea that promissory notes were obtained by fraud and covin, *and* without consideration, is bad for duplicity. *Smith v. Oates*, iv. U. C. R. 185.

7. To an action on a note the defendant pleads that he was induced to make the note by *the fraud, covin and misrepresentation* of the plaintiff. The plaintiff replies that he did not cause the defendant to make the note by *fraud, covin and misrepresentation* in manner and form, &c. *Held*, on demurrer to replication for duplicity, replication good. *Cox v. Cox*, iv. U. C. R. 207.

VII. INCONSISTENCY.

See PLEADING, VI. 4, *supra*.

1. Where a declaration in trespass contained two counts, the first for cutting down trees, and the second for carrying them away, and the defendant justified as to the cutting the trees in the said declaration mentioned, because the close in which the said trees were growing was his soil and freehold, whereupon in his own right he committed the said several trespasses in the said close in which, &c., and the plaintiff demurred specially, because the introduction was inconsistent with the body of the plea, being in bar of only part of the trespasses, whereas the body was in bar of all, the plea was held sufficient. *Ostrom v. O'Connor*, iii. O. S. 571.

2. The justifying under a writ issued in *May* 1845 a trespass charged to have been committed in *September* 1843, though bad on special demurrer from its seeming inconsistency, is not necessarily bad on general demurrer. *Cameron v. Lount*, iii. U. C. R. 453.

3. A plea stating that the defendant paid the note on the *31st December*

1848 before it became due, when by the declaration it appeared that the note fell due in *January* 1848, is bad for inconsistency on general demurrer. *Bowen v. Hawke*, vi. U. C. R. 275.

4. In a declaration on the case for procuring without reasonable cause the plaintiff to be indicted at the Court of Oyer and Terminer, averments, that the defendant on the *2nd of June*, went before a Court holden on the *1st of June*, and that the plaintiff was acquitted at Nisi Prius on an indictment found by the Court of Oyer and Terminer, were held bad. *Ashford v. Gokeen et al.*, vii. U. C. R. 547.

VIII. MATERIALITY.

See ARBITRATION AND AWARD, VIII.

6.—EXECUTOR ETC., III. 14.—INSURANCE, 1.—LIMITATIONS (STATUTE OF), IV. 12.—PLEADING, I. 17; VI. 5.—SHERIFF, III. 5.

Covenant for quiet enjoyment—Issue of title being in a third party.]

—1. Where in an action on a deed in fee for breach of covenant for quiet enjoyment without the hinderance &c. of the defendant, (the grantor), or any one claiming under her, the plaintiff declared that A. and others who had title from her at the time of the execution of the covenant to the plaintiff to the lands and woods conveyed, expelled the plaintiff under such title, and the defendant pleaded that A. and the others had not the title to the lands and woods under her at the time of the conveyance to the plaintiff: *Held*, on special demurrer to the plea, that the allegation of title in A. and the others at the time of the conveyance was immaterial, and not traversable, and that the plea was bad in denying the title of A. and the others to the lands and woods conjunctively, and not disjunctively. *Gwynne v. Brock*, Hil. Term, 5 Vic.

Common assumpsit—Denial of request.]—2. To an action on the com-

mon counts for board, &c., found for the defendant's illegitimate child, at the defendant's request, alleging a subsequent promise of the defendant to pay, &c., the defendant pleads a denial of the request.—The plea is bad, as resting the defence on an immaterial point, the promise should have been denied. *Flaherty v. Mairs*, i. U. C. R. 221.

Slander—Traverse of inducement.]

3. Where in case for slander of the plaintiff in his office of treasurer of the Ottawa District, he stated as inducement that it was his duty to return to the government a correct account, on oath, of all sums received by him from collectors for assessments, and averred that the defendant had alleged that he had perjured himself with respect to such statement, and the defendant pleaded negating the inducement only—the plea was held bad on special demurrer, as tendering an immaterial issue. *Johnston v. McDonald*, i. U. C. R. 384.

Malicious arrest—Plea, that defendant did not make the affidavit.]

—4. To a declaration "for maliciously causing the plaintiff to be arrested," the defendant pleaded that he did not make the affidavit stated in the declaration; to this the plaintiff demurred, assigning for special cause that the plea amounted to the general issue, and while professing to answer the whole cause of action, it answered only part, and as tendering an immaterial issue. *Long v. Lee*, iv. U. C. R. 377.

Trover—Colorable and immaterial matter.]—5. To an action of trover for 3000 feet of oak timber, and 200 bushels of wheat, the defendant pleads that he was seized in fee of a certain close, and being so seized he cut the said wheat and timber thereon growing, and afterwards, &c., delivered the same to one A., to be kept, who delivered them to the plaintiff, wherefore the defendant took them out of his possession, &c.; the plaintiff replies that

the property was the plaintiff's property, without this, &c.—Demurrer to replication, that it traversed colorable immaterial matter; also, general demurrer to the plea, that it does not shew the property belonged to the defendant: *Held*, replication bad: *Held* also, plea good on general demurrer. *Millard v. Kirkpatrick*, iv. U. C. R. 248.

Quære: If the plea would be good on special demurrer? *Ib*.

Landlord against tenant—Nunquam indebitatus.—6. *Semble*: That a plea of *nunquam indebitatus* to an action by a landlord against his tenant, for not giving him notice that he had been served with a declaration in ejectment, is a material issue, upon which judgment may be entered for the defendant if the verdict be so found. *Lount v. Smith*, v. U. C. R. 302.

Immaterial issues—Costs of the cause.—7. *Held*, that the issues tendered by the 4th plea in this cause, that no deed of assignment of the said supposed indenture of lease was ever granted and set over by the plaintiff to the defendant and others, &c., is an immaterial issue, and though found for the defendant, does not deprive the plaintiff of the benefit of his verdict on the other pleas, and of full costs in the cause. *Perry v. Richmond*, vi. U. C. R. 285.

[Traverses too large or too narrow—see *BILLS OF EXCHANGE ETC.*, V. 17.—*PLEADING*, II. 21, 22, 23, 24, 25, 27, 29, 41.]

IX. ADMISSIONS.

See *ASSUMPSIT*, II. 9.—*MALICIOUS ARREST*, 12.—*TRESPASS*, II. 7.

Trespass q. c. f.—Admission of title in a stranger, by replication to a plea of license—How far to be made use of by defendant.—Where in trespass *quare clausum fregit*, the defendant pleaded in one plea title in a stranger, and license from that stranger to enter the close, and in the other pleas plead-

ed title specially in the stranger, giving color to the plaintiff, and the plaintiff denied the license and took issue on the other pleas: *Held*, that the admission by the plaintiff of the title in the stranger by the replication to the plea of license, did not extend beyond that line of pleading, and that the admission could not be made use of by the defendant in support of his other pleas of title in the same party. *Wilkinson v. Walker*, ii. U. C. R. 162.

X. JOINDER OF COUNTS.

See *DEMURRERS*, 13, 15.

Counts in assumpsit and debt.—

1. Counts in assumpsit cannot be joined with counts in debt, and such misjoinder is not cured by verdict. *Beebe v. Secord et al.*, Tay. U. C. R. 565.

Counts in assumpsit and tort.—2.

In an action against a constable for an escape on mesne process, a count in tort and a count in assumpsit cannot be joined. *Ross et al. v. Webster*, v. U. C. R. 570.

3. *Held*, that the first special count in this declaration was in assumpsit, and the second in tort, and that there was therefore a misjoinder in counts. *Quin v. The School Trustees*, vii. U. C. R. 130.

Counts in assumpsit and trover.—

4. See "Demurrage," 2.

Partnership.—5. One count in a declaration for slander states a cause of action accruing to the plaintiffs as partners, by reason of its being an injury to them in their joint business; other counts in the same declaration charge the defendant with imputing forgery to the plaintiffs as partners, &c.: the imputation of forgery not being a partnership imputation, the declaration is bad for misjoinder of counts. Words alleged to have been spoken, cannot be amplified in their meaning by unwarranted innuendoes. *Morley et al. v. Nichols*, i. U. C. R. 235.

XI. PLEADING GENERALLY.

See AMENDMENT, II. *passim*.

Reference from one plea to another.]—1. A defendant may in one plea refer to allegations in another, in the same manner as in separate counts of a declaration. *Beaton v. McKenzie*, Trin. Term, 1 & 2 Vic.

Form of plea answering part of a declaration.]—2. Where a defendant having stated his defence to part of a declaration, then pleads as to another part, "and as to the said, &c., that," without using the words "he says:" *Held*, plea good on demurrer. *Brown et al. v. Ross*, iii. U. C. R. 158.

Introductory part of plea must be limited.]—3. A plea must be taken to be pleaded to the whole declaration, unless it be confined in the introductory part of it to one or more counts. *Poulton v. Dulmage*, vi. U. C. R. 227.

[See instances referred to at the end of div. VIII. of this title.]

XII. PLEADING IN PARTICULAR CASES.

1. *Abatement*—*See* ABATEMENT.
2. *Accord and satisfaction*—*See* ACCORD AND SATISFACTION.
3. *Administration bond*—*See* ADMINISTRATION BOND.
4. *Administrators*—*See* EXECUTOR ETC., II.; III. *passim*.
5. *Agreements*—*See* ASSUMPSIT, II. *passim*.
6. *Arbitration bonds*—*See* ARBITRATION AND AWARD, VI(2), *passim*.
7. *Assaults*—*See* ASSAULT AND BATTERY, *passim*.
8. *Assumpsit*—*See* ASSUMPSIT, II., case 1 to 7 inc.—NON ASSUMPSIT.
9. *Attornies*—*See* ATTORNEY, II(2), 4, 5; III. 9, 10.
10. *Auctions*—*See* AUCTION AND AUCTIONEER, 7.
11. *Awards*—*See* ARBITRATION AND AWARD, VI(2), *passim*.
12. *Bail*—*See* BAIL, 4, 5, 8, 10, 11, 15, 17.
13. *Bailment*—*See* BAILMENT.
14. *Bankrupts*—*See* BANKRUPT ETC., 18.
15. *Billiard tables*—*See* BILLIARD TABLES, 4.
16. *Bills of exchange*—*See* BILLS OF EXCHANGE ETC., IV. *passim*; V.
17. *Bonds*—*See* BOND, II.—INDEMNITY BOND, 5, et seq.
18. *Bonds to the limits*—*See* LIMITS, II. 6, et seq.
19. *Carriers*—*See* CARRIER, 18, 19.
20. *Case*—*See* CASE, 1, 4, 6, 7, 8.
21. *Composition*—*See* COMPOSITION.
22. *Constables*—*See* CONSTABLE, 1.
23. *Corporations*—*See* CORPORATION, 2.
24. *Covenants*—*See* COVENANT, II(2), *passim*.
25. *De injuria*—*See* DE INJURIA.
26. *Dower*—*See* DOWER, II. 3, 8, 10.
27. *Elections*—*See* ELECTIONS.
28. *Escapes*—*See* ESCAPE.
29. *Executors*—*See* EXECUTOR ETC., II.; III. *passim*.
30. *False imprisonment*—*See* FALSE IMPRISONMENT.
31. *False returns*—*See* FALSE RETURN, 2, 3, 4, 5, 6, 11, 13, 14.
32. *Foreign judgments*—*See* FOREIGN JUDGMENT, 1, 10, 13, 14.
33. *Gaming*—*See* GAMING, 6.
34. *Gaol limits*—*See* LIMITS, II. 6, et seq.
35. *Gas companies*—*See* GAS COMPANIES, 4.
36. *Goods sold*—*See* GOODS SOLD, 6.
37. *Guarantees*—*See* GUARANTEE.
38. *Hire of goods*—*See* BAILMENT.
39. *Husband and wife*—*See* ARREST OF JUDGMENT, 6, 13.
40. *Indemnity bonds*—*See* INDEMNITY BOND, 5, et seq.
41. *Insurance*—*See* INSURANCE, 1, 2, 5.
42. *Leases*—*See* COVENANT, II. *passim*.
43. *Libel*—*See* LIBEL AND SLANDER, II.
44. *Limitations*—*See* LIMITATIONS (STATUTE OF), IV.
45. *Limits*—*See* LIMITS, II. 6, et seq.
46. *Lotteries*—*See* GAMING, 6.
47. *Maintenance (Statute of)*—*See* MAINTENANCE (STATUTE OF), 18, et seq.
48. *Malicious arrest*—*See* MALICIOUS ARREST, 6, et seq.
49. *Masters and servants*—*See* MASTER AND SERVANT, 1, 5.
50. *Mesne profits*—*See* MESNE PROFITS.

51. *Money counts*—See MONEY PAID, 5.
52. *Nuisances*—See NUISANCE, 4.
53. *Patents*—See PATENT.
54. *Payment*—See PAYMENT, 5, 6, 7.
55. *Policies of Insurance*—See INSURANCE, 1, 2, 5.
56. *Promissory notes*—See BILLS OF EXCHANGE ETC., IV passim; V.
57. *Rent*—See cases referred to under RENT.
58. *Replevin*—See REPLEVIN ETC., 6.
59. *Set-off*—See SET-OFF, 6, 17.
60. *Sheriffs*—See SHERIFF, III.; IV.; V.
61. *Slander*—See LIBEL AND SLANDER, II.
62. *Statutes*—See STATUTES (CONSTRUCTION OF), 4, 5, 6.
63. *Tender*—See TENDER, 4, 5.
64. *Trespass*—See SHERIFF, III. passim.—TRESPASS, II. passim.
65. *Trover*—See DE INJURIA, 7, 8.—PLEADING, VIII. 5.—TROVER, II. 1, 2, 3.
66. *Use and occupation*—See ARREST OF JUDGMENT, 1.—PLEADING, II. 2.—USE AND OCCUPATION, 1.
67. *Ways*—See WAY.

PLEADING ISSUABLY.

See ASSESSMENT OF DAMAGES, 15.
INTERLOCUTORY JUDGMENT, 3.

PLENE ADMINISTRAVIT.

See EXECUTOR ETC., III. 2.—NEW TRIAL, X. 17, 18.

POLICY OF INSURANCE.

See EVIDENCE, I. 4.—INSURANCE, passim.

PORT BURWELL HARBOR COMPANY.

Harbor dues.]—Where in trespass against a harbor company for seizing lumber for toll, under 2 Wm. IV. ch. 15, the question was whether the harbor was in a fit state to shelter vessels, until which time toll could not be ex-

acted according to the act, and the judge directed the jury that if the harbor were fit to shelter empty vessels toll could be demanded, and they found a verdict for the defendants: *Held*, no misdirection. *Jenkins v. Port Burwell Harbor Company*, Trin. Term, 3 & 4 Vic.

PORT CREDIT HARBOR COMPANY.

Tolls.]—Under the statute 4 Wm. IV. ch. 32, parties receiving benefit from the Port Credit Harbor, in its unfinished state, must pay the tolls prescribed. *Port Credit Harbor Company v. Jones et al.*, v. U. C. R. 144.

PORT HOPE HARBOR COMPANY.

See CORPORATION, 6.

POSSESSION.

See CROWN GRANT, 17.—EJECTMENT, IV(1), 7; VIII. 1.—EXECUTION, 14.—GUARDIAN.—LANDLORD AND TENANT, II. 3.—LEAVE AND LICENSE, 2.—LIMITATIONS (STATUTE OF), II. passim.—MAINTENANCE (STATUTE OF), passim.—TRESPASS, I. passim; II. 27, 29, 30, 31.—TROVER, I. 8.

POSTEA.

See AMENDMENT, III. 10.

POST OFFICE.

See BILLS OF EXCHANGE ETC., III. 2; VIII. 2.

Postage—*Letter carried by inland navigation.*]—1. Postage on a letter carried by inland navigation from one post town to another must be charged according to the distance the letter is actually carried, and not according to

the distance by the post road between the two places. *Dickson v. Crooks*, Dra. Rep. 125.

Action against post master for neglect of duty—Declaration.]—2. An action will lie against a post master for not sending a letter, but the plaintiff in his declaration must aver that the letter was his. *Campbell v. McPherson*, Mich. Term, 3 Vic.

POUND AND POUND KEEPER.

See MASTER AND SERVANT, 3.—TRESPASS, II. 16, 17.

POUNDAGE AND SHERIFF'S FEES.

See ATTORNEY, II(2), 1, 3.—CORONER.—MANDAMUS, 20.—QUARTER SESSIONS, 2.

Execution placed in sheriff's hands—Compromise before sale.]—1. *Quære*: If a sheriff is entitled to poundage on a fi. fa. against lands where he advertizes the lands, but before sale the parties compromise? *Gates et al. v. Crooks*, iii. O. S. 286.

[See two following cases.]

2. A sheriff is not entitled to poundage on a fi. fa. against lands, where, after the delivery of the writ to him, no money having been made upon it, the plaintiff and defendant compromise. *Leeming et al. v. Hagerman*, Hil. Term, 6 Wm. IV.

3. If, after a seizure in execution by a sheriff, the parties settle, the plaintiff may apply to the court to fix the amount of sheriff's fees on the execution, but he will not be allowed the costs of the rule, even though no cause be shewn against it. *Home Sheriff, In re*, P. C. Macaulay, J., i. U. C. R. 412.

Levy on estreated recognizance—Poundage.]—4. Where, on a levy on

an estreated recognizance, the Crown discharges the estreat on payment of the sheriff's fees, the sheriff is entitled to poundage. *Regina v. Vinning et al.*, Hil. Term, 3 Vic.

When sheriff entitled to poundage under ca. sa.]—5. When the sheriff has the party in custody on a capias ad satisfaciendum: *Held*, that he has so far made the money, (the body being satisfaction), as to give him his claim to poundage under our rule of Hilary Term, 10 Vic. *Corbett v. McKenzie*, vi. U. C. R. 605.

Mileage.]—6. A sheriff is entitled to mileage only on going to make a levy, not on going to sell also. *Burwell v. Tomlinson*, Hil. Term, 2 Vic.

7 Wm. IV. ch. 3.]—7. Where a sheriff, before 7 Wm. IV. ch. 3, sec. 32, levied on a defendant's goods he was entitled to poundage, although there was no sale afterwards, that act not having a retrospective effect. *Commercial Bank v. Vannorman*, Trin. Term, 3 & 4 Vic., P. C., Macaulay, J.

POWER OF ATTORNEY.

See ARBITRATION AND AWARD, VIII. 9.—ATTACHMENT, II. 3, 4, 5.—DEED, I. 2.—FOREIGN LAW, 3.—PRINCIPAL AND AGENT, 6.

General power to sign bills, &c—Power to indorse.]—A general power to an agent to sign bills, notes, and to superintend, manage and direct all the affairs of the principal, gives him a power to indorse notes. *Auldjo v. McDougall*, iii. O. S. 199.

POWERS.

See DISTRESS, I. 12.—ESTATE, 1, 7. WILL, 7.

PRACTICE.

See ABATEMENT, 5, 9.—AFFIDAVIT.

AMENDMENT.—APPEAL.—APPEARANCE.—ARBITRATION ETC., II. passim; VI(1), passim; VIII. passim. ARREST, I.; IV. 10.—ARREST OF JUDGMENT.—ASSESSMENT OF DAMAGES.—ATTACHMENT, II.—BAIL, I; III.—CASSETUR BILLA.—COSTS DEMURRERS.—EJECTMENT.—EVIDENCE, VIII.—EXECUTION, passim. INFORMATION. — INTERLOCUTORY JUDGMENT.—JUDGMENT AS IN CASE OF NONSUIT.—JURY.—NEW TRIAL, XI.—NOLLE PROSEQUI.—NONSUIT. NOTICE OF ACTION. — NOTICE OF ASSESSMENT.—NOTICE OF TRIAL. OYER.—PAYMENT INTO COURT.—RECORD (NISI PRIUS).—REMANET. SATISFACTION. — SECURITY FOR COSTS.—SHERIFF, II.—SIMILITER. PROCEEDINGS. — TERM'S NOTICE. TESTATUM ACT.—VENUE.—WRITS OF TRIAL AND INQUIRY.

I. PLEADINGS.

II. RULES, ORDERS, AFFIDAVITS, AND MOTIONS.

III. MISCELLANEOUS POINTS.

I. PLEADINGS.

See AMENDMENT, II. passim.—BILLS OF EXCHANGE ETC., V. 36.—EJECTMENT, III.—IRREGULARITY, 2. 6. NEW ASSIGNMENT, 1.—NULLITY. NUL TIEL RECORD, 1.—PARTICULARS OF DEMAND, 3.—PUIS DARREIN CONTINUANCE. — REPLEVIN ETC., 3.—SIMILITER, 2.

Demand of plea—Service.—1. A demand of plea cannot be served before declaration filed, however short the time may be. *Read v. Johnson*, Tay. U. C. R. 674.

Time to plead — Renewal.—2. Time may be granted to plead partnership in abatement, but it will not be renewed on the ground that it had been omitted to be filed in consequence of

overtures of accommodation. *Gray v. Holme*, Tay. U. C. R. 541.

Further time, how obtained.—3. After service of demand of replication, rejoinder, &c., a party desirous of having further time must obtain a rule of court or a judge's order for that purpose. *Small v. Mackenzie*, Dr. Rep. 253.

[See case 34, infra.]

Pleas not intituled in the cause, nor signed by attorney.—4. Where pleas were not intituled in the cause nor signed by the attorney, but were indorsed with the style of the cause and the attorney's name, and were regularly filed and served, and the plaintiff treated them as a nullity and signed interlocutory judgment—the Court set the judgment aside. *Averill et al. v. Cameron*, iii. O. S. 176.

Declaration—Attorney's name.—5. It is not necessary that an attorney's name should be subscribed to a declaration, if it be stated in the commencement. *Crooks v. Davis et al.*, Easter Term, 6 Wm. IV.

Filing declaration in a district other than the one from which writ issued.—6. A plaintiff cannot, after taking out his ca. re. in one district, file his declaration in another. *Throp v. Cole*, Tay. U. C. R. 285.

Pleas filed but not served.—7. It is sufficient if pleas be filed in the proper office to prevent the plaintiff signing judgment, though they have not been served. *Mackinnon v. Johnston*, iii. O. S. 169.

8. It is not necessary that special pleas should be served; if they be filed it is sufficient. *King v. Dunn*, Easter Term, 2 Vic.

Time to declare against a prisoner.—9. Where a defendant was committed to prison on a bailable writ and afterwards, and before the return day of the writ, was released on bail, and on the return day of the writ entered special bail, he is not entitled to be

served with a declaration before the end of the term then next after such arrest. *Glenn v. Box*, iii. U. C. R. 182.

[Proper time for pleading after particulars delivered, or after a new assignment—See respectively PARTICULARS OF DEMAND, 3.—NEW ASSIGNMENT, 1.]

Time to reply.—10. A plaintiff has eight days to reply after a demand of replication. *Robinson v. McGrath*, Hil. Term, 2 Vic.

[*Quære*: Has he eight days to reply to amended pleas? *Playter v. Cameron*, iii. U. C. R. 129.]

Amended declaration—Service.—11. Where after a rule to consolidate the plaintiff had leave to amend his declaration by increasing his damages: *Held*, that it was not necessary to serve the amended declaration, nor a new demand of plea. *Ketchum et al. v. Hamilton*, Easter Term, 2 Vic.

[See further, case 24, *infra*.]

Time to demur.—12. Where the last pleading concludes to the country, if the opposite party demur, he must file his demurrer within the time allowed for replying after a demand. *Regina v. Gould*, Trin. Term, 2 & 3 Vic.

Declaration by-the-bye — Intituling.—13. A plaintiff cannot declare by-the-bye in this country, nor can a declaration be intituled regularly of a day subsequent to the return day of the writ, and in vacation. *Ross et al. v. Hixon*, Easter Term, 3 Vic.

Demurrer by defendant to particular pleadings—Plaintiff entitled to recover, independent of those pleadings.—14. Where the defendant demurred to a replication to a plea to one of several counts in a declaration, and the plaintiff having recovered on the other counts, confessed his replication bad and entered judgment as to that count for the defendant—the Court held that such proceeding was irregular, the proper course being to take

no judgment on the pleadings demurred to, the plaintiff being entitled to recover independently of these pleadings. *Rochleau v. Bidwell*, ii. O. S. 319.

[See cases 18, 28, 31, *infra*.]

Amended declaration — Time to plead de novo.—15. Where a declaration is amended of a term subsequent to its intituling and delivery, the defendant is allowed four days to plead de novo, and the time is reckoned exclusive of the first and inclusive of the last day. *Fuller v. Hall*, Hil. Term, 5 Vic.

Plea—Title of term omitted.—16. It is not a ground for setting aside a plea for irregularity, that it is intituled only of the day it was filed, and not of any term. *Lemaine v. Raymond et al.*, Hil. Term, 5 Vic., P. C. McLean, J.

[See case 20, *infra*.]

Several pleas—Several counts.—17. Under the rule prohibiting the use of several pleas &c., founded on one and the same principal matter, a judge has power to strike out any such pleas. The rule which declares that several counts varying merely in the statement of the same subject matter of complaint shall not be allowed, has reference merely to the taxation of costs, and does not forbid the use of them. *Johnson v. Hunter*, i. U. C. R. 280.

Declaration in assumpsit—Some breaches good, others bad.—18. If there be a demurrer to a declaration in assumpsit in which there are several breaches assigned, and some of the breaches are well assigned, and the others badly, the defendant will not be entitled to judgment on the whole declaration, but each party will obtain judgment on the breaches which are decided in his favor. *O'Neill et al. v. Leight*, ii. U. C. R. 204.

Plea, a waiver of defect in declaration.—19. Where the defendant pleads over and takes no exception to

the declaration, the Court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity. *Bank of British North America v. Sherwood*, vi. U. C. R. 213.

Declaration—General and special intituling.—20. Where a declaration in assumpsit was intituled "Mich. Term, to wit, 22nd September 1840," and the promises were laid on that day, and the defendant demurred specially because the plaintiff had declared in Michaelmas Term for a cause of action which did not accrue until the 22nd of September, the demurrer was overruled, the memorandum being considered as a special intituling, and the declaration therefore appearing of the day it was filed. The proper course for the defendant to have pursued would have been to have moved to set aside the special intituling. *Bristowe v. Pattenson*, Hil. Term, 4 Vic.

Declaration filed before certain new rules came into force, but served after.—21. A declaration filed in Hilary Term 1842, but served after Trinity Term, when certain new rules came into force, must be pleaded according to those new rules. *Clark v. White*, Mich. Term, 7 Vic., P. C. Jones, J.

[See case 30, *infra*.]

Declaration carelessly drawn up—Amendment.—22. If a declaration be drawn up in a slovenly and careless style, the Court, although expressing an opinion in favor of the plaintiff on demurrer, will frequently direct him to amend without costs. *Murphy v. Burnham*, ii. U. C. R. 261.

Service of declaration on defendant after appearance by attorney.—23. Where an appearance was actually entered by the defendant's attorney, although it seemed to have been mislaid by the deputy clerk of the Crown, and the plaintiff served his declaration on the defendant and not on his attorney,

and then signed judgment for want of a plea, the Court set aside the proceedings with costs. *Ryan et al. v. Leonard*, iii. O. S. 307.

[Appearance in person—pleading by attorney—See IRREGULARITY, 6.]

Declaration—Misnomer—Amendment after service.—24. *Semble*: Where a declaration is amended in the name of the plaintiff it is sufficient to amend the declaration filed, without filing an amended copy of the declaration. *Hart et al. v. Boyle*, Mich. Term, 5 Vic.

Pleas amounting to general issue when general issue also pleaded.—25. The Court refused to strike out several pleas on the ground that they amounted to the general issue, which was also pleaded, and *semble*, the plaintiff should have demurred.—(Macauley, J. dissentiente.) *Truax et al. v. Christy*, Dra. Rep. 224.

Assumpsit—Omission of party to whom promise made.—26. In assumpsit the omission in the declaration of the statement to whom the promises were made, can be objected to only on special demurrer. *Miller v. Munro*, Easter Term, 2 Vic.

Omission of a necessary averment—How taken advantage of.—27. In debt on motion to arrest judgment on the ground that "it was not alleged that the goods &c. were found by the plaintiff:" *Semble*, that this objection would have been good on special demurrer. *Kendrick v. Maxwell*, vii. U. C. R. 94.

Several breaches on bond, one good.—28. If in debt on bond several breaches be assigned, the plaintiff is entitled to judgment on general demurrer, if one of them be good. *Fowke v. Lyster*, Easter Term, 3 Vic.

"Plaintiff" instead of "defendant."—29. It is no ground of demurrer to write, by mistake, in the

pleadings, "plaintiff" instead of "defendant," where there can be no doubt as to what was meant. *Hayward v. Harper*, iv. U. C. R. 489.

Declaration not conforming to certain new rules, but otherwise good.]—30. It is no ground of demurrer, that a declaration upon a bill or note does not conform to certain new rules, if it be otherwise good in itself. *Acheson v. McKenzie*, iv. U. C. R. 230.

One replication to two pleas—Demurrer—Judgment on part of replication for plaintiff.]—31. Where a plaintiff replies de injuria to two pleas in one replication, which is demurred to, judgment may be given for the plaintiff on demurrer as regards part of his replication, and for the defendant on another part. *McCuniffe v. Allan et al.*, v. U. C. R. 571.

Setting aside plea of set off.]—32. The Court refused in this case, upon the facts therein stated, to set aside summarily a plea of set off. *Watt v. Buell*, vii. U. C. R. 307.

Setting aside pleas for fraud.]—33. The Court will not interfere summarily to set aside a plea on the ground of fraud, except in manifestly clear cases. *Waltenberger v. McLean et al.*, iv. U. C. R. 350, and *Smith v. Dissitt*, v. U. C. R. 206.

Further time to declare.]—34. A plaintiff may take out a rule for a month's further time to declare. *Stebbins v. O'Grady*, Mich. Term, 2 Vic.

Allowing defendant to plead after the entry of final judgment.]—35. The Court will not set aside proceedings three months after the entry of final judgment, to let the defendant in to plead on affidavits of merits, where no satisfactory reason is shewn for the delay in the application. *Billings v. Rapelje et al.*, Easter Term, 3 Vic.

II. RULES, ORDERS, AFFIDAVITS AND MOTIONS.

See AMENDMENT, II. 35.—ARBITRATION AND AWARD, II. passim; V. 2, 4, 13, 14.—ARREST OF JUDGMENT, 12.—ATTACHMENT, II.—ATTORNEY, II(3), 7.—COMMISSION TO EXAMINE WITNESSES, 4, 9.—COSTS, I(3), passim; II. 1; IV(1), 7, 8, 9, 11; VIII. 12.—INDORSEMENT, I. 9.—INTERLOCUTORY JUDGMENT, 9.—IRREGULARITY, 4, 12, 16, 17, 20, 21, 22.—JUDGE (IN CHAMBERS), 5.—JUDGMENT AS IN CASE OF NONSUIT, III.—NEW TRIAL, IX. passim; XI.—NONSUIT, passim.—NOTICE OF TRIAL, 8, 14. PARTICULARS OF DEMAND, 1, 10. RECORD (NISI PRIUS), 3.—SECURITY FOR COSTS, 2, 3, 4.—STAY OF PROCEEDINGS, 1, 2.

Service of original summons by mistake—Order.]—1. An order may be made on a verified copy of a judge's summons, where the original is served by mistake. *Tift et al. v. Wallace et al.*, Mich. Term, 2 Vic.

Summons granted in vacation, returnable in term—Order.]—2. A summons granted in vacation returnable on a day which falls within the term, will be made absolute by the judge who granted it. *Masson et al. v. McQueen*, Trin. Term, 2 & 3 Vic.

When rules nisi become absolute.]—3. *Semble*, that rules nisi do not become rules absolute, though ordered to be made so by the Court, until they are drawn up or issued. *Commercial Bank v. Hughes et al.*, iv. U. C. R. 167.

Rules must be obeyed, though informal, when not set aside.]—4. If a rule of this Court be informal in its intituling, the party must move to set it aside; while it continues in force it must be obeyed. *Heather v. Wardman*, iv. U. C. R. 173.

New matter on return of rule nisi.]—5. At the return of a rule nisi, the party who has obtained the rule cannot produce affidavits containing new matter. *Gavan v. Lyon*, Tay, U. C. R. 599.

[Also, see case 41, *infra*.]

Reviving of lapsed rule nisi]—6. The Court revived a lapsed rule nisi, upon affidavit that it had been served and transmitted but mislaid, and did not arrive until after term. *Johnson v. Durand*, Dra. Rep. 66.

Rule nisi granted nunc pro tunc.]—7. Where there was a verdict for the plaintiff, and the defendant did not move for a new trial within the first four days, owing to a misapprehension on the part of his counsel that the plaintiff's counsel was to have disposed of the question of new trial on the argument of a demurrer in the cause without any rule, a rule nisi was granted nunc pro tunc. *Bank of Montreal v. Bethune*, Trin. Term, 5 & 6 Wm. IV.

Reference to compute—Service of rule.]—8. The affidavit of service of a rule nisi to compute, must shew (if a personal service be not effected,) that the copy was served at the defendant's place of abode on some grown up person connected with his household. *Mittleberger v. Whitehead et al.*, Mich. Term, 1 Vic.

[So service of a rule at the defendant's residence on a person who promised to give it to the defendant was insufficient, as it should have been shewn that the person so served was connected with the defendant's residence. *Taylor v. Whitworth*, ix. M. & W. 478.]

Rules—Parties' names.]—9. Rules, as well as affidavits, must be intituled with the christian names of the parties of the suit in full. *McNeil v. McNeil*, Trin. Term, 2 & 3 Vic.

Rule nisi, when a stay of proceedings.]—10. A rule nisi does not operate as a stay of proceedings, unless so expressly declared in the rule. *Hastings v. Champion et al.*, Mich. Term, 3 Vic.

Titles of affidavits and rules in two causes on same motion.]—11. Where the same motion is made in two causes, affidavits may be used and rules intituled in both, as well where the motion was against a third party, as a sheriff, as inter parties. *Commercial Bank v. Vanorman*, Trin. Term, 3 & 4 Vic., P. C., Macaulay, J.

Affidavits of both plaintiff and defendant improperly styled.]—12. Where a defendant moved for a rule, on an affidavit incorrectly intituled as to the cause, and the plaintiff, in shewing cause by his attorney, intituled his affidavits as the defendant had intituled his, stating the proper style of the cause and shewing that he was not attorney for the plaintiff in the cause in which the affidavits were intituled, the defendant's rule was discharged, there being a fatal variance if there were only one cause, and if there were two, no service being proved; it was, however, discharged without costs, as the affidavits of the defendant were intituled in the same way as the affidavits of the plaintiff, whereas they should have been intituled in the right cause, denying the existence of the other. *Terry v. Matthews*, Trin. Term, 3 & 4 Vic., P. C., Macaulay, J.

Contradictory affidavits as to facts.]—13. Where, on a motion as to a matter of practice, the affidavits are contradictory as to the facts, the rule will be made absolute or discharged without costs. *Orr v. Stabback*, Trin. Term, 3 & 4 Vic., P. C., Macaulay, J.

Opening rule.]—14. The Court will not open a rule after it has been made absolute, where the opposite party has had regular notice of the rule nisi and full opportunity to answer it. *Palmer v. McDonald*, Trin. Term, 4 & 5 Vic.

[See power of judge to open or rescind his own order—JUDGE (IN CHAMBERS), 5.

Irregularity—Misnomer in rule.]

—15. A rule nisi having been obtained to set aside a bailable writ and arrest thereon for irregularity, the rule was discharged without costs, for a variance between the christian name of the plaintiff in the cause and the name in the rule. *Hibbert v. Johnson*, i. U. C. R. 403.

Pointing out irregularities in rule or referring to affidavits.]—16. Any irregularity which is complained of as a ground of setting aside a proceeding must be specifically pointed out in the rule, or so clearly referred to as contained in the affidavits filed as not to be mistaken. *Thompson v. Zwick*, i. U. C. R. 338.

[See several cases, *infra*.]

17. Where a motion is made to set aside proceedings for irregularity, and the irregularity is mentioned specifically neither in the rule nor in the affidavit on which it was moved, nor pointed out in the rule by reference to the grounds disclosed in the affidavit, the rule will be discharged. *Hamilton v. Howcutt*, i. U. C. R. 403.

18. Where a rule nisi was obtained to set aside service of process for defects in the notice to appear, and the defect intended to be relied on was, that the notice was to appear in the “King’s Bench, instead of the Queen’s Bench.” It was held that the rule must be discharged, as the irregularity was not sufficiently pointed out in it. *Matthie v. Lewis*, Trin. Term, 5 & 6 Vic., P. C. Macaulay, J.

Intituling affidavits to set aside proceedings for irregularity.]—19.

Where a defendant moved to set aside a writ of *capias ad satisfaciendum* for a variance between the writ and the judgment, by the insertion of the initial letter of a christian name of the defendant in the writ which was not in the judgment, and used affidavits in the title of which the initial letter was also inserted: *Held*, that they could not be read, and as without them, the

writ did not appear to have issued in the cause, the rule was discharged. *Williamson v. McDonell et al.*, Trin. Term, 7 Vic., P. C. Macaulay, J.

Pointing out irregularity.]—20. If an arrest be moved against as irregular, the irregularity complained of must be pointed out in the rule, or referred to in the rule as appearing in the affidavits. *Cook et al. v. Norton*, Trin. Term, 7 Vic., P. C. Macaulay, J.

21. Where the defendant moved to set aside the service of process for irregularity in the notice to appear, but the irregularity complained of was neither pointed out in the rule nor specified in the affidavits, the rule was discharged, but without costs, as it was a preliminary objection. *Teller v. Wilson*, i. U. C. R. 417.

22. Where a rule nisi was obtained to set aside an arrest for “a defect in the affidavit to hold to bail,” but the defect was not specifically pointed out in the rule, the rule was discharged. *McGann v. Howison*, Hil. Term, 7 Vic., P. C. Macaulay, J.

23. A rule nisi to set aside an arrest “on grounds disclosed in affidavits filed,” was discharged because the defect was not apparent from the affidavits, but could only be ascertained by a reference to the writ which was annexed to them. *McGann v. Howison et al.*, Hil. Term, 7 Vic.

[Also see cases 30 and 44, *infra*.]

Amendment of rule.]—24. Where a rule nisi to deprive the plaintiff of costs under 49 Geo. III. ch. 4 was not correctly intituled in the cause, the Court allowed an amendment by the affidavits filed, on payment of costs. *Ball v. McKenzie*, i. U. C. R. 412.

Irregularity incorrectly set forth in affidavits.]—25. Where a defendant moved to set aside the service of a writ of *capias ad respondendum* for irregularity, and it appeared that the process served was a *testatum* and not an original writ, the rule was discharged

with costs. *Tool v. Low*, ii. U. C. R. 95.

[Also case 32, *infra*.]

Pointing out irregularity.—26. If, on a motion to set aside proceedings for irregularity, the irregularities complained of are neither specified in the rule nisi nor referred to in it as being disclosed in the affidavits, the rule will be discharged. *Henderson v. Harper et al.*, ii. U. C. R. 97.

Setting aside service of process—Affidavit.—27. An affidavit to set aside the service of process made by a stranger, and verifying the copy of process objected to by the information and belief of deponent that the defendant was served with “the annexed copy of process in the cause, and no other,” is insufficient. *Baley v. Brown et al.*, ii. U. C. R. 99.

Discharging rule for amendment by plaintiff, after argument on demurrer.—28. After argument on demurrer to the plaintiff’s declaration, the plaintiff had leave to amend on payment of costs, but afterwards, and before any amendment had been made, the defendant obtained a rule staying all further proceedings in the cause on payment of the costs of the cause. The defendant afterwards, and without paying or taxing those costs, moved to discharge the plaintiff’s rule to amend, because the amendment had not been made, nor costs of demurrer paid, and the Court discharged his rule with costs. *Hutt v. Keith*, ii. U. C. R. 100.

Motion against an irregularity—Informality in affidavit.—29. Where a defendant moved to set aside an alias writ for want of an original to warrant it, and in his affidavit did not shew that no original writ had issued, his rule was discharged with costs. *Hughes v. Hamilton et al.*, ii. U. C. R. 172.

Pointing out irregularity.—30. Where a rule nisi is moved to set aside the service of process on grounds disclosed in affidavits filed, and the irregu-

larity complained of is in the copy of process annexed to the affidavits filed, and does not appear in the affidavits alone, the rule should be discharged. *Bates v. McMahon*, ii. U. C. R. 178.

Change of rule from nonsuit to new trial.—31. Where a defendant obtains a rule nisi for a nonsuit as on leave reserved, and it afterwards appears that no such leave was reserved, the Court will not allow him to change his rule into a rule for a new trial. *Doe dem. Gilkison v. Shorey*, ii. U. C. R. 183.

Misstatement of irregularity moved against.—32. Where a rule nisi was obtained to set aside a verdict on the ground that the judge at Nisi Prius had improperly allowed the amendment of the *venire* on the Nisi Prius record after the jury were sworn, and that the cause was tried without the jury being re-sworn after the amendment, and it appeared it was the *jurata* and not the *venire* that was amended, the rule was discharged. *Jarvis v. Thompson et al.*, ii. U. C. R. 271.

Irregularity—Waiver by irregular party—Costs to opposite party.—33. Where a party in a cause takes an irregular proceeding, which the opposite party moves to set aside, and the irregular party then gives notice of the waiver of such proceeding, the party moving will be entitled to have his rule made absolute, unless the costs to which he was put to were paid, or tendered to him at the time that the notice of the waiver was given. *Kelly v. Bleeker*, ii. U. C. R. 377.

Pointing out irregularity.—34. If, on a motion to set aside proceedings for irregularity, the irregularity complained of is neither pointed out in the rule nor referred to distinctly in the affidavits, the rule will be discharged. *Gordon v. Carrick*, ii. U. C. R. 379.

Style of cause—Intituling of affidavits.—35. Where the defendant

moved to set aside the plaintiff's proceedings in a cause in which the parties' names had been stated in different ways by the attorneys on both sides in the affidavits and proceedings, and the rule for setting aside the proceedings was not intitled in the true style of the cause—the Court allowed a preliminary objection on that ground to prevail, and discharged the rule. *Grant v. Taylor et al.*, ii. U. C. R. 407.

Reviving a rule nisi after its abandonment.]—36. The defendant, after a verdict in detainue for the plaintiff and 1s. damages, was granted a rule nisi for a new trial; but, having obtained a certificate to deprive the plaintiff of costs under 43 Eliz., he served a written notice on the plaintiff's attorney, that he did not intend to proceed upon the rule nisi, which accordingly was never taken out or served; afterwards the certificate to deprive the plaintiff of costs was rescinded, and the defendant then obtained a rule nisi to revive the rule nisi he had abandoned, but the Court refused to make the rule absolute. *Davidson v. Raddick*, iii. U. C. R. 82.

How far joint contractors bound by a rule served upon one of them alone.] 37. The plaintiffs sue A., B. and C. on a joint contract; B. allows judgment to go by default.—The plaintiffs failing to prove a joint contract, accept a nonsuit as to B. and C., and take a verdict against A.—A. moves in term to set the verdict aside.—B. and C. are not made parties to the rule.—The Court made the rule absolute.—The order is not served on B. and C., neither do they adopt nor act upon it.—B. and C. afterwards enter judgment on the nonsuit: *Held*, that B. and C., not being parties to the rule nisi, are not bound by the order made thereon, unless they can be shewn to have been served with it, or to have adopted or acted upon it. *Commercial Bank v. Hughes et al.*, iv. U. C. R. 167.

Irregular proceeding by party moving against an irregularity.]—

38. A party moving to set aside the proceedings of another for irregularity must be strictly regular in his own. Where, for instance, a party takes out a four-day rule on the Wednesday before the end of the term, and neglects to serve it till Friday, the Court will not allow him to amend his rule so as to make it returnable on Saturday. *Hunter v. Thurtell et al.*, iv. U. C. R. 170.

Intituling affidavit denying service of an award.]—39. An affidavit denying service of an award must be intituled in the cause, and not "the Queen v. Defendant," as it is an affidavit made before the attachment has been ordered. If the affidavit however contain a good answer upon the merits, the party will have leave to swear to an amended affidavit. *Heather v. Wardman*, iv. U. C. R. 173.

Rule to discontinue—Payment of costs.]—40. Unless the plaintiff, upon taking out a rule to discontinue, serve the defendant at the same time with an appointment to tax costs, the defendant may regard the rule to discontinue as a nullity. *Perrin et al. v. Eaglesum*, iv. U. C. R. 254.

Objections raised in argument not disclosed on motion]—41. The Court will not disturb a verdict upon an objection taken upon the argument of a rule nisi, which had not been disclosed in moving the rule. *Corner v. McKinnon*, iv. U. C. R. 350.

Enforcing award by attachment—Intituling of papers.]—42. In an application for an attachment for the non-payment of money ordered to be paid by an award, the submission being by bond, the rule nisi was intituled "in the matter of A. v. B."—The affidavit of service was intituled in the same way. The rule making the submission by bond a rule of this Court, was intituled in this Court, "A. v. B."

The affidavit of the execution of the award was intituled in this Court only: *Held*, that the intituling of the rule nisi and the affidavit of service thereof was correct. *Held also*, that there was no material variance between the intituling of the rule nisi and the other previous papers. *Beckett v. Cotton et al., In re*, v. U. C. R. 271.

Proceedings taken after service of rule forbidding the same.]—43. Where a rule with a stay of proceedings has been taken out and served to shew cause why a verdict rendered should not be set aside for irregularity, a notice of argument of demurrer, and the setting down the same demurrer for argument, given subsequently to the rule, will be set aside with costs. *City Bank v. Eccles*, v. U. C. R. 633.

Pointing out irregularity.]—44. Where a rule nisi is moved to set aside the service of process on grounds disclosed in affidavits filed, and the irregularity complained of is in the copy of process annexed to the affidavits filed, and does not appear in the affidavits alone, the rule will be discharged. *Lyster v. Boulton*, v. U. C. R. 632.

Order for particulars of payment.]—45. *Semble*: That it is not now the practice in England to give an order upon the defendant to deliver particulars of payment. *Campbell v. Gzowski*, vii. U. C. R. 412.

Setting aside defective proceedings—Motion.]—46. Where proceedings are defective in point of form, and are objected to on that account, copies must be produced in support of the application. *Smart v. Demerea*, iii. O. S. 440.

Proceedings taken contrary to an order obtained by an agent without principal's knowledge.]—47. Where a judge's order was obtained by the agent of the defendant's attorney to set aside the service of process, and both the plaintiffs' and defendants' attorneys being ignorant of it, the first declared and the other pleaded; but

on being aware of the order, the defendants' attorney gave notice to the plaintiffs' attorney that he would move to set aside his proceedings for irregularity if he went on—the Court refused to set aside the proceedings, there being no affidavit of merits, and the defendant having precluded himself by his plea. *Simpson v. Matthison and Ward v. Ward*, iii. O. S. 305.

Setting aside process served in wrong district—Affidavit.]—48. In moving to set aside service of process, because served in the wrong district, the affidavit on which the motion is made must state that the service was not on the confines, or that there was no dispute about boundaries. *Cryder v. Thompson*, Mich. Term, 3 Vic.

III. MISCELLANEOUS POINTS.

Sec AMENDMENT, II. *passim*.—APPEAL, 3.—ARREST, IV. 9.—ATTORNEY, I. 8.—BOND, II. 4.—CAPIAS AD RESPONDENDUM, 5.—DISTRICT COURT, 15.—EJECTMENT, VIII. 15.—EVIDENCE, IV. 5; VIII. JUDGMENT, 27, 28.—RECORD, 2.—SET OFF, 2, 13.

1. Parties, by consent, cannot dispense with the ordinary proceedings of the Court. *Flint v. Spafford*, Tay. U. C. R. 600.

[See case 11 *infra*, and an exception, TERM'S NOTICE, 1.

Proceedings contrary to rule of court—Amendment.]—2. Proceedings cannot be sustained which are in direct opposition to the terms of the rule of Court, though the terms of such rule be not in accordance with the order of the Court, through a mistake of the clerk; and such proceedings cannot be supported by a subsequent amendment, for the effect of such amendment is not retrospective. *De dem. Burnham v. Simmonds*, vii. U. C. R. 598.

Filing papers.]—3. No paper is properly filed, until marked "filed"

by the proper officer. *Campbell v. Madden*, Dra. Rep. 2.

[But see next case.]

Filing demurrers.]—4. Leaving a demurrer with the proper officer to file is sufficient, although he do not actually file it. *Regina v. Gould*, Mich. Term, 3 Vic.

Entry for trial.]—5. A cause cannot be entered either for assessment or trial after the commission day of the assizes, without the consent of the defendant. *Hall v. Griswold*, Easter Term, 6 Wm. IV.

[The rule of Hil. Term, 13 Vic. No. 33, regulating the entry of records for trial, rescinded the rules of Hil. Term, 7 Geo. IV., and Mich. Term, 3 Vic.; and the rule of Hil. Term, 13 Vic., has likewise been rescinded by the rule of Mich. Term, 15 Vic., the one now in force, which orders that no record shall be entered for trial, unless between nine in the forenoon and twelve noon of the day for opening the assizes.]

Service of papers.]—6. It is irregular to serve papers on an attorney's clerk at a distance from the attorney's residence or place of business. *Tiffany v. Bullen*, Easter Term, 6 Wm. IV.

7. Service of a notice on Good Friday is good service. *Clarke v. Fuller*, ii. U. C. R. 99.

Objection waived at Nisi Prius cannot be argued in banc.]—8. Where the defendant at the trial disclaiming any wish to succeed against the justice of the case, assents to the reception of parol evidence to prove the understanding on which a note was given, and a verdict is given against him, he cannot be allowed afterwards to argue in banc. the technical objection he has waived at the trial. *Davis v. McSherry*, vii. U. C. R. 490.

Court will not try facts on affidavits.]—9. The Court will not try matters of fact on affidavits. Where, therefore, the defendant moved to set aside a verdict for irregularity, because the notice of trial had not been served eight days before the assizes, and the

plaintiff's attorney swore that the defendant's attorney agreed to take short notice of trial, which the plaintiff's attorney denied: *Held*, that the verdict must be set aside. *Smith v. Ask*, v. U. C. R. 497.

Service of papers.]—10. The rules of this Court of Mich. Term, 4 Geo. IV., respecting the service of pleadings and papers in a cause on an attorney residing out of the district in which the action is brought, apply equally to all districts, and to the attorneys for both parties in the cause. *Clemow v. Her Majesty's Ordnance*, v. U. C. R. 458.

Agreement between parties contrary to the practice.]—11. The Court will not carry into effect an undertaking between parties, that one of several defendants who has not pleaded shall be considered as having pleaded, and as standing on the record in the same position as the other defendants. *Sifton v. McCabe et al.*, vi. U. C. R. 394.

Cause once determined finally disposed of.]—12. This Court fully recognizes the English rule of Hil. Term, 3 James I., which orders that no cause once argued and determined shall again be brought before the Court. *Boulton v. Randall*, Tay. U. C. R. 160.

PRACTICE COURT.

The full Court will not entertain any motion that has been already heard and determined in the Practice Court. *Notman v. Rapelje*, Mich. Term, 7. Vic.

PREROGATIVE.

See CERTIORARI, 5.

PRESBYTERIAN CHURCH, GALT.

Ejectment by trustees—Demise.]—Where, by deed of bargain and sale,

land was conveyed to certain persons named as trustees, and "to others" not named, and their successors, to hold to the persons as named, and "to others, trustees as aforesaid, and their successors in office, in fee simple absolutely forever, to the only proper use and behoof of the said (the persons named), and others, trustees as aforesaid, and their successors in office for ever, for the use of the minister of the Presbyterian Church, Galt, in connection with the Church of Scotland, and his successors in office in all times coming, provided that such minister shall be a member of the synod of Canada, in connection with the Church of Scotland:" *Held*, that no action will lie on a demise in the name of the trustees of the Presbyterian Church at Galt, as in a corporate capacity, but that a demise might be laid by those named in the deed, though they were not in fact trustees as the deed assumed them to be. *Doe dem. Trustees of the Presbyterian Church in Galt et al. v. Bain*, iii. U. C. R. 197.

PRESCRIPTION.

See EASEMENT, 1, 3, 5.

PRESENTMENT OF BILLS AND NOTES.

See BILLS OF EXCHANGE ETC., II. passim.

PRESUMPTION OF DEATH.

See EVIDENCE, VI.

PRETENDED TITLE.

See MAINTENANCE (STATUTE OF).

PRINCIPAL AND AGENT.

See AUCTION ETC., 4.—BILLS OF EXCHANGE ETC., II. 8; V. 1.—CONTRACT, 11.—EVIDENCE, VII. 4.—LIMITATIONS (STATUTE OF), I. 4.—MALICIOUS ARREST, 2, 7, 18. POWER OF ATTORNEY.—SET OFF, 16.—ST. LAWRENCE CANAL.—TRESPASS, I. 16.—TROVER, I. 5.

Personal liability.—1. Commissioners appointed under an act of parliament employing persons to make a macadamized road are not personally responsible. *New v. Burn et al.*, Trin. Term, 3 & 4 Vic.

Countermand of directions to agent after they had been partly executed.—2. Where in assumpsit for money had and received the defendant pleaded that he had received the money as agent of the plaintiff, and had paid it over by his directions to a person to whom the plaintiff was indebted; and the plaintiff replied that he countermanded the direction before payment, to which the defendant rejoined that before countermand or any notice thereof he had given notice to the plaintiff's creditor that he held the money for his use, the rejoinder was held a good answer on demurrer. *Coates v. Lloyd*, iii. U. C. R. 51.

[See AUCTION, ETC., 4.]

Action by agent for money lent—Defence of money being another's.—3. A person receiving money from an agent, on a promise to return it to him, cannot, in an action by the agent to recover it back, set up as a defence that the money really belongs to a third party. *Lister v. Burnham*, i. U. C. R. 419.

General agency—Special agency.—4. Where A., the general agent for shipping B.'s flour, shipped 25 barrels of it as usual to A. & Co. in Kingston, and, before the sailing of the ship, D., another agent, under special instructions from B., shipped the same flour to Messrs. B. & Co., in Kingston, to

be forwarded to Montreal; *Held*, that as the owner of the flour could at any time change its destination before the ship sailed, the owners of the ship were liable to B. through their master's last bill of lading, given to the special agent D., the flour having been forwarded by the master in mistake to Messrs. A. & Co. in Kingston, and left there, instead of being forwarded, as last directed, through B. & Co. to Montreal. *Graham v. Browne et al.*, v. U. C. R. 234.

Right of principal to sue on contract made by agent.—5. *Semble*, that a principal, for whose benefit a contract has been made by his agent, may sue thereon in his (the principal's) own name, though the defendant may have known nothing of the principal's interest in the subject matter of the contract at the time. *Mair v. Holton*, iv. U. C. R. 505.

Appointment of agent to receive money payable under a bond—Seal.—6. Where a bond was given to certain persons appointed under act of parliament for the payment of money at a certain place, and the defendant pleaded to an action on the bond that the plaintiffs appointed an agent to whom the money was to be paid, and that the agent received it, but not at the place: *Held*, on special demurrer, that it was not necessary that the appointment of the agent should be under seal to vary the condition, and that his receipt of the money was a sufficient discharge of the bond. *Regina v. Snieder et al.*, Trin. Term, 3 & 4 Vic.

Action by principal against agent—Defence, set off, &c.—7. *Held*, that the defendant, upon the facts stated in the report, had no right to a set off against the plaintiff upon the common counts, neither could he support a plea of payment, or accord and satisfaction; but that if he had any remedy at all against the plaintiff (and the Court thought none existed), he should have brought a special action

for negligence. *Sword v. Carruthers*, vii. U. C. R. 313.

Stoppage in transitu.—8. *Semble also*, that in this case the defendant had not put it in the plaintiff's power to exercise any right of stoppage in transitu. *Ib.*

Payment to a solicitor—Question of agency.—9. *Held*, that under the circumstances of this case (as given in the statement and judgment) the solicitor could not be considered the agent of the plaintiff, so as to make a payment to the solicitor from the defendant a payment to the plaintiff. *Proudfoot v. Murray*, vii. U. C. R. 456.

PRINCIPAL AND SURETY.

See BOND, II. 17.—CONTRACT, 10.—DIVISION COURT, 5, 6.—EXECUTOR, ETC., I. 12.—LIMITS, II. 15.—REPLEVIN, ETC., 7.—SCIRE FACIAS, 6.—SHERIFF, V.

Change of office for which security given—Surety no longer responsible.—1. A surety by bond, for the due performance of the office of a bank agent, is not responsible for losses occurring after the nature of the agency has been changed and the agent appointed a cashier. *Bank of Upper Canada v. Covert et al.*, Trin. Term, 7 Wm. IV.

Surety cannot sue co-surety with principal.—2. A surety cannot sue a co-surety jointly with the principal, for the amount of a debt of the principal which the surety has been obliged to pay. *Burnham v. Choat et al.*, Easter Term, 2 Vic.

Separate actions against two sureties—Release.—3. Where separate actions are brought against two sureties the discharge of the one does not operate as a discharge of the other. *Burwell v. Edison*, Mich. Term, 3 Vic.

Cognovit—Time given to principal without sureties' consent.—4. After

a cognovit given by the principal and his sureties jointly, the Court will not set aside a judgment entered against all because time has been given to the principal without the consent of the sureties. *Mowat v. Switzer et al.*, Mich. Term, 3 Vic.

PRIORITY OF EXECUTIONS.

See ABSCONDING DEBTOR, 16, 25.—BANKRUPT, ETC., 10.—EXECUTION, 5, 9—FALSE RETURN, 7, 8.—SHERIFF, V. 16.

PRIORITY OF REGISTRIES.

See DEED, III. 1, 2, 3, 6, 7, 13, 16, 17, 18, and 19.

PRISONER.

See ARREST, II. 8, et seq.; III.; IV. 8, 16.—ATTACHMENT, III. 2.—BAIL, III. 4.—COGNOVIT, 4.—ESCAPE.—INSOLVENT, ETC., passim. LIMITS.—PRACTICE, I. 9.—SECURITY FOR COSTS, 1.—SHERIFF, II. 23.

PRIVILEGE.

See ARREST, II. 1 to 7 in.—PARLIAMENT, 2 et seq.—PROCESS, 7, 8.

PRIVILEGED COMMUNICATION.

See LIBEL AND SLANDER, I. 1, 2, 3, 4.

With an attorney.—A communication made to an attorney in his professional character is privileged, although no suit concerning the subject matter be pending at the time, nor any contemplated. *Battersby v. Haycock*, Easter Term, 2 Vic.

PROBATE AND PROBATE COURT.

See EXECUTOR ETC., I. 1; II. 3.

PROCESS.

PROCEDENDO.

See ARREST, III. 6.

PROCEEDINGS (STAY OF).

See STAY OF PROCEEDINGS.

PROCESS.

See ATTORNEY, II(1), 7.—BOARD OF WORKS.—CANADA COMPANY.—CAPIAS AD RESPONDENDUM.—CAPIAS AD SATISFACIENDUM.—DISTINGAS.—EXECUTION.—EXECUTOR ETC., III. 1.—FIERI FACIAS. IRREGULARITY, 18.—PARLIAMENT, 2, et seq.—PRACTICE, II. 47, 48.

Teste.—1. A writ issued in vacation must be tested the last day of the preceding term. *Armstrong v. Scobell*, iii. O. S. 303.

Service by a person other than a sheriff's officer—Waiver.—2. If a defendant accept process served by a person who is not a sheriff's officer, he cannot afterwards on that ground set the service aside. *Arnold v. Fish*, Easter Term, 6 Wm. IV.

Service.—3. A true copy of non-bailable process must be served on the defendant. *Scott et al. v. Hiffernan*, Mich. Term, 7 Wm. IV.

[See case 9, *infra*.]

Service—Inspection of original demanded.—4. Where at the time of service of process inspection of the original was demanded and refused, the service was set aside with costs. *Weller v. Wallace et al.*, Mich. Term, 1 Vic.

Continuance of writs.—5. Where there have been several writs of *ca. re.* sued out and the last served, the plaintiff (with reference to a plea of payment or the Statute of Limitations), in order to give himself the advantage of having the action considered as being commenced by the first writ, must shew at the trial that the first writ was

returned: *Semble*, that the continuance between the intermediate writs may be entered at any time. *McLean v. Knox*, iv. U. C. R. 52.

Writ issued from one district directed to sheriff of another.—6. An original ca. re. may, under the 8th Vic. ch. 36, issue out of the office of the deputy clerk of the Crown of one district, directed to the sheriff of another district. *McMan v. Patterson et al.*, v. U. C. R. 631.

Service on a witness.—7. It is irregular to serve process on a witness, while attending in court at Nisi Prius under subpœna. *Thompson v. Calder*, i. U. C. R. 403.

Service on a party to a suit.—8. The Court will not set aside the service of process for irregularity, upon the ground that it was served upon the defendant while he was attending the assizes as plaintiff in a civil suit pending and entered for trial. *The City of Kingston v. Brown*, iv. U. C. R. 117.

Copy of process.—9. The omission of the letters "L. S." or of any mark to denote a seal to the copy of a writ, is not an irregularity. *Cameron v. Wheeler*, vi. U. C. R. 355.

PROCHEIN AMY.

See TRESPASS, I. 20.

PROCLAMATIONS.

See DOWER, II. 14.

PRODUCE (NOTICE TO).

See NOTICE TO PRODUCE.

PROPERT.

See ARBITRATION AND AWARD, VI (2), 9.—SHERIFF, V. 9.

General principle.—1. A party

founding his right of action on a deed, which must be presumed to be in his possession, must make propret of the deed. *McLean v. Tinsley*, vii. U. C. R. 40.

Excuse.—2. It is not sufficient to excuse the propret of a deed, to allege that it is in the possession of a third party, who refuses to produce it or deliver it to the plaintiff. *Brown v. Robertson*, i. U. C. R. 379.

PROHIBITION.

To Court of Review—Stay of proceedings in prohibition.—1. Where on an application for a prohibition, to be directed to the Vice Chancellor sitting in bankruptcy as the Court of Review, the Court were about to order the writ to issue, when the party whose proceedings were about to be restrained applied for directions that the party moving should declare in prohibition, which was accordingly ordered by the Court, and afterwards the same party applied to stay further proceedings without costs, which was opposed by the plaintiff in prohibition, on the ground that he was proceeding to recover substantial damages—the Court refused to direct the proceedings to be stayed. *Regina v. The Vice Chancellor of Upper Canada (Jameson)*, ii. U. C. R. 92.

Damages.—2. In a proceeding in prohibition the plaintiff can only recover nominal damages. If he wish to recover substantial damages, he must proceed by action on the case after the entry of judgment quod stet prohibition. *Mittleberger v. Merritt et al.*, ii. U. C. R. 413.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROTEST.

See **BILLS OF EXCHANGE ETC.**, III.
passim.

PROVINCIAL AGRICULTURAL
SOCIETY.

See **CONTRACT**, 11.

PROXY.

See **BANK OF UPPER CANADA**, 1.

PUBLIC COMPANIES.

See **COMPANIES**.

PUBLIC DOCUMEETS.

See **EVIDENCE**, IV. 4.

PUBLIC NUISANCE.

See **NUISANCE**.—**WATER**, 4.

PUBLIC ROAD.

See **HIGHWAY**.

PUBLIC SCHOOLS.

See **COMMON SCHOOLS**.

PUBLIC WORKS.

See **ARBITRATION AND AWARD**, I. 10.

PUIS DARREIN CONTINUANCE.

See **ABATEMENT**, 5.—**ARBITRATION AND AWARD**, VIII. 3.—**ATTORNEY**, III. 9.—**BANKRUPT ETC.**, 9.—**FOREIGN JUDGMENT**, 1.—**WITNESS**, 7.

Release.—After judgment by default, a plea of release puis darrein continuance will not be allowed. *Shaw v. Shaw*, Mich. Term, 6 Vic.

QUAKER.

See **ARREST**, I. 39.

QUARE CLAUSUM FREGIT.

See **COSTS**, I(1), 20.

QUARTER SESSIONS.

See **APPEAL**, 1, 6.—**CERTIORARI**, 5.
MANDAMUS, 8, 11, 12.

Confirmation of a surveyor's report of a public road.—1. Justices in quarter sessions cannot decline confirming the unopposed report of a surveyor of highways recommending the alteration or opening of a new road, on the ground that the proposed road has been finally rejected by the verdict of a jury on a former occasion, if upon inspection the alteration and line of road rejected by the jury and the object of the pending proceeding do not seem to be identical. *Rex v. The Justices of the Home District*, Trin. Term, 11 Geo. IV.

Sheriff's fees due by district by whom to be paid.—2. The fees of the sheriffs of the different districts payable by the districts for services rendered by the sheriffs in the administration of justice, are to be audited and paid by the order of the justices of the peace of the several districts in sessions, and not under the direction of the district councils. *Hamilton and Justices of the London District, In re*, Trin. Term, 5 & 6 Vic.

Power of justices to erect a gaol from district funds.—3. Justices of the peace in sessions cannot apply the funds of a district towards building a new gaol and court house without an act of parliament specially conferring that authority upon them. *Rex v. Justices of Newcastle*, Dra. Rep. 214.

QUEEN'S BENCH (KING'S BENCH).

See APPEAL, 1, 2, 3, 4.—JURISDICTION.

Title.]—1. The proper style of this Court is “before His Majesty’s justices,” not “*before the King himself*” “*coram vobis*,” not “*coram nobis*.” *Boulton v. Randall*, Tay. U.C.R. 184.

[See the following case.]

2. The plaintiff declares upon a judgment and gives the following description of the Court of Queen’s Bench in Toronto—“For that whereas the said plaintiff in the ninth year of the reign of our Lady the now Queen in the Court of our said Lady the Queen, *before the Queen herself*, by judgment of the same Court recovered a judgment &c. as by the record still remaining in the same Court of our Lady the Queen, at *Toronto* aforesaid, more fully appears.” *Held*, on demurrer to this description of the Court as being uncertain, description good. *French v. Kingsmill*, iv. U. C. R. 215.

Equitable interference.]—3. The Court refused to interfere equitably to set aside a sheriff’s sale and covenant for the payment of the purchase money entered into thereon. *Wood v. Leeming et al.*, Tay. U. C. R. 639.

QUEEN'S BENCH COSTS.

See COSTS, I.—DISTRICT COURT, 3.

QUEEN'S COUNSEL.

A patent from the Crown appointing a barrister a Queen’s counsel, directed that he should take precedence after another Queen’s counsel who was subsequently appointed attorney general: *Held*, that such patent did not then entitle him to precedence before the solicitor general. *Boulton, In re*, i. U. C. R. 317.

QUIET ENJOYMENT (COVENANT FOR).

See COVENANT, II(2), 1.

QUI TAM ACTION.

See MAINTENANCE (STATUTE OF), *passim*.—PENAL ACTION—USURY *passim*.

QUO WARRANTO.

See BANK OF UPPER CANADA, 2.—MANDAMUS, 15.

Brockville Police Act—Contesting validity of election.]—1. The Court will not grant a mandamus to try an election of corporate officers chosen under the Brockville Police Act, but will leave the parties contesting the validity of such election to their remedy by information in the nature of a quo warranto. *Election, Board of Police, Brockville*, iii. O. S. 173.

To district councillors.]—2. An information in the nature of a quo warranto may issue to shew cause by what authority a municipal councillor for any district in the province claims to be a member of such council. *Biggar, In re*, iii. U. C. R. 144.

Refused to a person seeking a clerkship who could not write.]—3. The Court refused an information in the nature of a quo warranto with a view of placing a party in the office of a township clerk, who in making his application shewed that he could not write. *Regina v. Ryan*, vi. U. C. R. 296.

RACE COURSE.

See GAMING, 1, 2, 3, 4, 5.

RAILWAY COMPANIES.

See CARRIER, 14.—KINGSTON MARINE RAILWAY COMPANY.—TORONTO AND LAKE HURON RAILROAD COMPANY.

RAPE.

See SEDUCTION, 2, 3, 4.

RATE COLLECTOR.

See BOND, I. 7.—DISTRICT COUNCIL, 6, 8.

Not paying over monies ineligible to any township office.]—Under sec. 18 of the statute 1 Vic. ch. 21, a collector of rates who has not paid over the amount collected by him, and settled his accounts with the treasurer on or before the third Monday in December of the year for which he has been serving, is ineligible to any township office. *Regina v. Ryan*, vi. U. C. R. 296.

READINESS AND WILLINGNESS.

See ACCORD AND SATISFACTION, 1. ARBITRATION AND AWARD, VI(2), 2, 3.—ASSUMPSIT, II. 5.—PAYMENT, 7.—PLEADING, II. 40.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS ARREST.—MALICIOUS PROSECUTION.

RECEIPT.

See FIERI FACIAS, 3.

Receipt in full not conclusive.]—1. A receipt in full is not conclusive evidence of payment, but is a mere admission which is always susceptible of explanation in respect to the circumstances under which it is given, and the purposes for which it was intended to answer. *Montforton v. Bondit*, i. U. C. R. 362.

2. A receipt given and accepted for the delivery of flour, is not conclusive upon the party accepting it. *Mair v. Holton*, iv. U. C. R. 505.

Construction as to defendant's personal liability thereon.]—3. Held, that the following receipt "Received of Bradford & Cutler a note they held against A. Ladd, on which there was a balance due, September 1st 1842, of \$400.33c., which is to be paid to them in Michigan treasury warrants; also, a balance of accounts of \$57.17c., which is to be paid in current money if enough is collected, if not, in warrants. (Signed), Dennis O'Brien," could not be considered on the face of it evidence of a promise by Mr. O'Brien personally to pay these debts. *Bradford et al. v. O'Brien*, vii. U. C. R. 562.

RECEIVER GENERAL.

The receiver general of this province is not liable to actions, at the suit of individuals, for money placed in his hands by the executive to be distributed among them. *Butler v. Dunn*, Tay. U. C. R. 572.

RECITAL.

See SHIP REGISTRY ACT, 1, 2.—STATUTES (CONSTRUCTION OF), 1, 2, 3, 4, 5, 6.

RECOGNIZANCE.

See BAIL, III. 7.—DISTRICT COURT, 10, 11.—POUNDAGE ETC., 4.

Estreat—Relief after return of the writ.]—1. Where the recognizance of a witness on a criminal charge is estreated for his non-appearance, the Court will not interfere after the return of the writ and payment of the estreat to the sheriff, although grounds be shewn which would probably have seemed satisfactory to a judge presiding at the Criminal Court. *Regina v. LeClerc*, 4 Vic.

Estreat—Relief under 7 Wm. IV.]—2. Where a recognizance for the appearance of a person charged with

a criminal offence is estreated for his non-appearance at the time appointed, the Court, on an application to discharge the estreat under 7 Wm. IV. ch. 10, sec. 10, will act only on the grounds set forth in the statute. *Regina v. Matthews et al.*, Trin. Term, 4 & 5 Vic.

Effect of omission by a magistrate to give the notice, under 7 Wm. IV. ch. 10.—3. It is no ground for discharging the estreat of a recognizance to appear as a witness that the magistrate who bound the witness over did not give him a notice of the time he was to appear, according to 7 Wm. IV. ch. 10, sec. 8. *Regina v. Thorpe*, Hil. Term, 6 Vic.

4. It is no ground for discharging the estreat of a recognizance of bail that the bail did not receive from the magistrate who took the recognizance the notice directed to be given by 7 Wm. IV. ch. 10, sec. 8. *Regina v. Schram et al.*, ii. U. C. R. 91.

What recognizances taken under 7 Vic. ch. 31 binding since its repeal.—5. Since the repeal of the act 7 Vic. ch. 31—*Held*, that the recognizances taken under its authority are not binding upon the bail, except in regard to cases in which the debtor has been notified, and has made default while the act was still in force.—(Macaulay, J. dissentiente.) *Macdonald v Weeks et al.*, iii. U. C. R. 441.

Affidavit of taking, by whom to be made.—6. A commissioner who takes a recognizance of bail cannot himself make the affidavit of such taking. *Walbridge v. Lunt*, Tay. U. C. R. 638.

Allegation of filing of affidavit of taking of recognizance.—7. In an action against a sheriff for the escape of a prisoner rendered before judgment, the averment in his plea that the affidavit of the due taking of the recognizance, or of the justification "was duly filed with the clerk of the

district court," is sufficient. *Shoul-dice v. Fraser*, vii. U. C. R. 60.

RECORD.

Public records presumed correct till contrary proved.—1. Every roll and record filed and docketed in the proper office will be presumed correct until the contrary be shewn, although it may appear that the entries were not examined with the original papers by the officer at the time of filing and docketing. *Prentice v. Hamilton*, Dra. Rep. 410.

Practice as to bringing in a record when pleaded.—2. Where a record pleaded is of another Court, the practice is to take out a rule appointing a day to bring the record into this Court—otherwise, where the record pleaded is of the same Court, there a mere notice will be sufficient. *Hamilton v. Shears et al.*, v. U. C. R. 306.

RECORD (NISI PRIUS).

See AMENDMENT, II. passim.—ASSESSMENT OF DAMAGES, 2.—CARRIER, 18.—IRREGULARITY, 5.—PRACTICE, III. 5.

Seal of Court, when necessary.—1. There is no occasion for the seal of the Court to be affixed to a record of nisi prius in an outer district where the suit has been instituted and the cause tried there. *Scott v. McGregor*, Tay. U. C. R. 110.

2. It is necessary that a nisi prius record in the Home District should be sealed. *McLean v. Neeson et al.*, Trin. Term, 5 & 6 Vic.

Striking out pleas—Mere order insufficient.—3. Where in debt on bond the plaintiff obtained a judge's order to strike out the plea of non est factum, but passed his nisi prius record with that plea on it, only annexing the judge's order to the record: *Held*,

that the plea still remained a part of the record; and notwithstanding the order annexed, the plaintiff must prove the bond. *Atkins v. Clark et al.*, Mich. Term, 3 Vic.

Making up a new record, when original destroyed.—4. A new nisi prius record was allowed to be made up, the original having been destroyed by fire. *White v. Hutchinson*, Tay. U. C. R. 416.

Award of venire when issues in fact and in law.—5. When there are issues in fact and in law, and both sets of issues go to the whole declaration, it is not necessary that the award of venire on the nisi prius record should be tam ad triandum quam inquirendum. *Beatty v. McMasters et al.*, Trin. Term, 2 & 3 Vic.

6. Where there are issues in fact and in law, the venire must be ad triandum quam inquirendum, and a venire ad triandum only is irregular. *Hamilton v. McFarland*, Mich. Term 3 Vic.

[See AMENDMENT, II. 36.]

Ejectment—Rules of Hil. Term, 13 Vic.—7. The new rules of Hil. Term 13 Vic., do not dispense with the placita, continuances, jurata &c. in the record in an action of ejectment. *Doe dem. Burnham v. Simmonds*, vii. U. C. R. 508.

Clerical error.—8. The Court will not set aside a verdict for irregularity because an evident clerical defect has been altered on the record after it has been entered for trial. *Culbert v. Conger*, vii. U. C. R. 389.

Effect of mistake in the teste of venire facias.—9. A mistake in the teste of the venire, inserting the 15th year of the reign instead of the 12th, is not an irregularity appearing on the record, but in the process issuing to the coroner to summon the jury, and is therefore no ground to set aside the verdict for irregularity. *Ib.*

Alteration of record without leave—Verdict set aside.—10. Where a

nisi prius record, when entered with the clerk of assize, terminated with a transcript of the pleadings, and contained no award of venire, no jurata, or any day of nisi prius given, and after it had been some days in this state, was withdrawn from the clerk of assize by the plaintiff's attorney and altered, by adding what was necessary without leave—the Court, upon application in term setting out these facts, set aside the verdict. *Russel et ux. v. Graham*, vii. U. C. R. 159.

Record unwarranted by previous proceedings—Objection when entertained.—11. The Court cannot look behind the record, unless where the application is to set aside the record itself. An objection, therefore, to the record as being improperly made up without proceedings to warrant it, cannot be entertained upon an application to set aside the assessment of damages. *Gamble et al. v. Rees*, vii. U. C. R. 406.

Remanet—Repassing and resealing.—12. Where the record, after having been made a remanet, had not been repassed or resealed, and was otherwise before the Court in a slovenly state, the Court set aside the verdict with costs: they bound themselves, however, to no inflexible rule on the subject of repassing and resealing. *Lucas v. Peatman*, vii. U. C. R. 20.

[See new rules of Hil. Term, 13 Vic., No. xli.]

Incorrect nisi prius clause—Verdict set aside.—13. A verdict was set aside on account of there being no proper nisi prius clause in the record. *Doe dem. Murphy v. McGuire et al.*, vii. U. C. R. 312.

[Records in ejectment under the new act—See statute 14 & 15 Vic. ch. 114, sec. 6.]

RECTOR.

See WILL, 13.

Ejectment for glebe land—Evidence.—In ejectment by a rector for

glebe land, he must prove presentation, institution and induction; and if any one of these be wanting, the action must fail. *Doe dem. Creen v. Friesman*, Hil. Term, 4 Vic.

REDEMPTION (RIGHT OF).

See EXECUTION, 11.—MAINTENANCE (STATUTE OF), 7.—MORTGAGE, 5, 13.

REFERENCE.

I. TO ARBITRATION.

See ARBITRATION AND AWARD, I.

II. TO COMPUTE.

See ATTORNEY, IV. 4.—BILLS OF EXCHANGE ETC., VIII. 6.—PRACTICE, II. 8.

REGISTRY AND REGISTRAR.

See DEED, III.—INFANT, 5.—MORTGAGE, 8, 14.—SHERIFF'S DEED, 5. SHIP REGISTRY ACT.—WILL, 1, 2, 3.

RELEASE.

I. OF ESTATES IN LAND.

II. OF CAUSES OF ACTION.

I. OF ESTATES IN LAND.

See DEED, III. 13.—JOINT TENANCY, 2.—SHERIFF'S DEED, 2.—TITLE, 10.

Operation.]—Where a party does not grant all his interest in the land to B., but merely gives up his right, this is a mere release, and to make it good, requires that the releasee should have a previous estate or interest in possession, on which the release could operate. *Doe dem. Phelan v. Kinnally*, vii. U. C. R. 480.

II. OF CAUSES OF ACTION.

See ARBITRATION AND AWARD, IV (1), 1; VIII. 6.—ATTORNEY, III. 9.—COVENANT, II(2), 11.—EJECTMENT, VIII. 20.—JUDGMENT, 6.—NUISANCE, 3.—PRINCIPAL AND SURETY, 3.—REPLEVIN ETC., 15. TRESPASS, I. 21.—WITNESS, 7.

Action by assignee of a chose in action—Fraudulent release by assignor.]—Where a chose in action has been assigned, and an action is brought for the benefit of the assignee in the name of the assignor, the assignor will not be allowed fraudulently to give a release; and where a release from him, which has been obtained by fraud as against the assignee, is pleaded, the Court will set the plea aside and order that the release shall not be made use of at the trial. *Rowand v. Tyler*, Mich. Term, 5 Wm. IV.

RELIGIOUS SOCIETIES.

See EJECTMENT, IV(2), 6.—PRESBYTERIAN CHURCH, GALT.

Deed to a church described in a particular way—Change of its constitution—Ejectment.]—1. Where real property was given by deed in trust for the Methodist Episcopal Church in Canada, according to the rules adopted by the general annual conference, and that when any of the trustees or their successors should cease to be a member of that church, that such trustee should vacate his trusteeship; and at a general conference the majority did away with episcopacy, and having appointed new trustees, claimed the property from the old trustees on the ground, that as they had not conformed to the rules of the general conference they had ceased to be trustees according to the terms of the trust deed, and the new trustees took possession of the property: *Held*, on ejectment brought by the old trustees, that they

were entitled to recover, the conference having no power to do away with episcopacy, and the old trustees by continuing in the original church, having complied with the terms of the deed. *Doe dem. Trustees Methodist Episcopal Church v. Bell*, Hil. Term, 7 Wm. IV.

[This decision was afterwards reversed in *Doe dem. Reynolds v. Flint*, Mich. Term, 4 Vic., and *Doe dem. Reynolds v. Flint*, has been since upheld in *Doe dem. Methodist Episcopal Trustees v. Brass*, Trin. Term. 5 & 6 Vic.]

Trespass against a trustee who had ceased to be a member.]—2. Trespass was held to be maintainable by the trustees of a Methodist chapel against a person who was a trustee, but having ceased to be a member of the society could not hold the trust under the provisions of the deed which created it; and some of the plaintiffs, who were not the original trustees, but had been elected as their successors under the same provisions, were properly joined in the action. *Everett et al. v. Howell et al.*, Mich. Term, 1 Vic.

Ejectment by trustees in a corporate name.]—3. An ejectment cannot be maintained on a demise of a Methodist church, as a corporate body: the demise must be in their names as individuals. *Doe dem. Methodist Trustees v. Carwin*, Trin. Term, 1 & 2 Vic.

REMAINDER (ESTATE IN).

See ESTATE, 5, 9.

REMANET.

See JUDGMENT AS IN CASE OF NON-SUIT, I. 2, 12.—RECORD (NISI PRIUS, 12.—WRITS OF TRIAL ETC., 2.

Trial by proviso.]—After a cause has been carried down to be tried and made a remanet, the defendant cannot rule the plaintiff to enter the issue, but his proper course is to take the cause

down to trial by proviso. *Boulton v. Jarvis*, Mich. Term, 5 Vic., P. C., Jones, J.

REMITTITUR DAMNA.

See AMENDMENT, III. 7, 8.

RENDER (BY BAIL).

See ARREST, II. 16.—BAIL, I. 4, 5, 6, 7, 8.

RENT.

See BOND, II. 15.—COVENANT, II(1), 6; II(2), 4.—DE INJURIA, 4.—DISTRESS, I. passim.—LANDLORD AND TENANT, I. 9; II. 4.—LEASE, I. 5, 7; II. 1.—MIDLAND DISTRICT TURNPIKE TRUST, 2, 3.—PLEADING, II. 15.—REPLEVIN ETC., passim.—TRESPASS, II. 24.

Apportionment.]—Where a tenant leased premises at one entire year and his landlord died, having devised the premises among several persons: *Held*, that those persons might bring separate actions against the tenant for such part of the rent as each would be entitled to according to his respective share, without any other apportionment than a jury might make in each suit. *Hare et ux. v. Proudfoot*, Hil. Term, 7 Vic.

RENT CHARGE.

See EXECUTION, 18.

REPLEADER.

See DISTRICT COURT, 7.

After nonsuit.]—There can be no repleader where the plaintiff has been nonsuited, and so out of Court. *Lount v. Smith*, v. U. C. R. 302.

[On a judgment of repleader, neither party is entitled to costs. *Plummer v. Lee*, ii. N. & W. 495.]

REPLEVIN AND REPLEVIN BOND.

See AMENDMENT, II. 21.—DISTRICT COURT, 3, 4, 14.—JUDGMENT AS IN CASE OF NONSUIT, I. 5.—NEW TRIAL, V. 6.—PLEADING, V. 3.

Writ.—1. A writ of replevin with the justices clause is irregular. *Cornell v. Quick*, Dra. Rep. 440.

Distress for rent—Evidence.—2. In replevin, under the plea of non tenuit to an avowry for rent in arrear, the plaintiff may shew an eviction. *Cormack v. Bergin*, Trin. Term, 7 Wm. IV.

Service of summons—Time to declare.—3. Personal service of the summons in replevin is not necessary; and after the goods have been replevied, if the defendant do not appear, the plaintiff may proceed by notice, under 4 Wm. IV. ch. 7, sec. 6, and he must declare as in other cases within a year after the return of the writ, or he will be out of Court. *Zavitz v. Hoover et al.*, Mich. Term, 1 Vic.

Issue of non tenuit—Evidence.—4. Where in replevin, the landlord avowed for two-and-a-quarter years' rent, but proved a tenancy for only one year, although the tenant continued in possession for three years, having however paid no rent nor made any acknowledgment during the last two years: *Held*, a fatal variance on the plea of non tenuit. *Thompson v. Forsyth*, Easter Term, 3 Vic.

Plea of riens in arrear—Deduction for improvements.—5. Where it appeared that the landlord had covenanted to allow the tenant all reasonable improvements made by him in the amount of his rent: *Held*, that the tenant could deduct the value of the improvements from the rent due, and the landlord could recover only for the residue; and that such right of reduction might be given in evidence under the plea of riens in arrear, and need

not be specially pleaded. *Wilcoxson v. Palmer*, Trin. Term, 3 & 4 Vic.

[Also, see cases 8 and 9, *infra*.]

Form of declaration on bond.—6. In a declaration by the assignee of a replevin bond, it is bad on general demurrer to declare in the form used in England, with an averment of a plaint made to the sheriff. *Hutt v. Keith*, i. U. C. R. 478.

Parties to bond going to arbitration release the surety.—7. Where, after proceedings have been commenced on a replevin bond, the parties to the replevin go to arbitration without the assent of the surety, all further proceedings against the surety will be stayed: *Aliter*, where the reference to arbitration takes place with his assent. *Hutt v. Gilleland*, and *Hutt v. Keith*, i. U. C. R. 540.

Riens in arrear—Deduction for improvements.—8. To an avowry under a distress for rent, the plaintiff replied riens in arrear, and also set out specially an agreement to be allowed to make certain repairs and to deduct the amount from the rent which he averred he had done; this answer to the avowry is good, under either of the above pleas. *Wheeler v. Sime et al.*, iii. U. C. R. 143.

Agreement to allow deduction from rent, for improvements &c.—9. A landlord agreed with his tenant that if he should not paint the tavern outside, and the sheds and driving house, &c. in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint; the tenant only began to paint in June 1845, during which month he painted one side and two ends of the tavern, but had not *finished* painting any of the buildings on the 12th of July 1845, when the landlord distrained for a quarter's rent due on the 1st of July 1845: *Held*, in an action of replevin, that under the terms of the lease with respect to the painting, the landlord might distrain for the quarter's rent

due on the 1st of July 1845, though the painting which had been then begun but not completed, exceeded the quarter's rent for which the landlord had distrained. *Millmine v. Hart*, iv. U. C. R. 525.

Amendment of defendant's avowry.]—10. Where there have been two leases between the plaintiff and the defendant in replevin, and the defendant avows under the wrong one, the Court will allow him to amend at the trial, if the amendment cannot be shewn to prejudice the plaintiff. *Edwards v. Holmes*, iv. U. C. R. 94.

11. *Quære*: Can the action of replevin be sustained in any Court at the present time upon a mere tortious taking or detention not in the nature of a distress? *Foster v. Miller*, v. U. C. R. 509.

[See statute 14 & 15 Vic. ch. 64, sec. 1.]

Nil habuit replied by a stranger.]—12. A stranger, whose goods have been seized on the premises of a tenant and distrained for rent, cannot, any more than the tenant himself, question the landlord's right to demise. *Smith v. Aubrey*, vii. U. C. R. 90.

Denial of landlord's title at time of demise.]—13. Any plea to an avowry involving a denial of the landlord's title at the time of the demise is bad. *Hartley et al. v. Jarvis*, vii. U. C. R. 545.

Forfeiture of bond.]—14. The Court will not determine summarily whether a replevin bond has been forfeited or not. *Hoover et al. v. Zavitz*, Trin. Term, 1 & 2 Vic.

Several obligors—Release of one—Its effect.]—15. A release by plaintiff to one of several obligors in a replevin bond to the sheriff, after an assignment to the plaintiff, releases all; and releasing the sureties, the plaintiff has no right of action against the sheriff for taking insufficient sureties. *Kirkendall v. Thomas*, vii. U. C. R. 30.

[See statute 14 & 15 Vic. ch. 64, intituled "An Act to amend and extend the law relating to the remedy by replevin in Upper Canada."]

REQUEST.

See ARREST, I. 11, 12, 13, 14, 31.—COMMON SCHOOLS, 4.—DISTRICT COUNCIL, 10.—MONEY PAID, 5.—PLEADING, II. 17; VIII. 2.

Averment of, when necessary.]—1. Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request must be averred, but the omission of it is immaterial after verdict. *Daily v. Stevenson*, Easter Term, 2 Vic.

Omission—How taken advantage of.]—2. The omission of an averment of a special request is matter of form, and cannot be objected to on general demurrer. *McLeod v. Jackson*, Mich. Term, 7 Wm. IV.

REQUESTS (COURT OF).

See BAILIFF, 3.—DIVISION COURT.

RE-REGISTRY.

See DEED, II. 16.

RESIDENCE.

See ABATEMENT, 1, 3. 8.—ABSCONDING DEBTOR, 8.—ARREST, I. 31.—SECURITY FOR COSTS.

RESTITUTION.

See FORCIBLE ENTRY ETC., 1, 2.

RETURN OF WRITS.

See AMENDMENT, I. 8.—FALSE RETURN.—FIERI FACIAS, 9.—SHERIFF, I. 1, 12, 16, 17; II. *passim*.

REVENUE.

See CUSTOMS ACTS.

In debts due to the Crown, which would be cognizable in the Court of

Exchequer in England, this Court may give relief, when it appears that in law, reason, or good conscience, the debtor ought not to be charged. *Regina v. Bonter*, Mich. Term, 7 Vic.

REVENUE LAWS.

See CUSTOMS ACTS, (of which this is a continuation).

Action for seizure of goods by an unauthorized person — Notice.]—8.

A seizure of goods for a breach of the revenue laws by a person who is not an authorized officer of the customs at the time, but whose act is subsequently adopted and sanctioned by the collector of customs for the part of the country where the seizure is made, is so far protected by the statutes relating to the customs as to entitle the person seizing to the notice of action, &c., required by those statutes. *Wadsworth v. Murphy*, ii. U. C. R. 120.

Forfeited goods when condemned.]—9. Where goods are seized for what appears to be a direct violation of the revenue laws relating to the customs, by which they become forfeited, they are absolutely condemned at the end of thirty days, if no claim is properly made for them, according to the imperial statute 4 & 5 Wm. IV. ch. 89, sec. 25; and after such condemnation for default of such claim, the owner cannot bring trespass for any alleged illegality in the seizure. *Ib.*

Information for a penalty—Scienter a proper question for the jury—Requisites of information.]—10. In an information for a penalty under the customs acts, for knowingly harboring smuggled goods, the scienter is a proper question for the jury; and in such an information, the particular illegal act, as that the goods were imported without the payment of duty, &c., should be specified, and the information should expressly shew that the offence charged to have been committed was contrary to the form of the

statute. *Regina v. Aumond*, and *Regina v. Easton*, ii. U. C. R. 166.

Recovery of second penalty.]—11. If a quantity of smuggled goods be purchased at one time, but seizures of them are made at different times, only one penalty for harboring them can be recovered. *Ib.*

[It was designed that the above cases should have been placed under the title "CUSTOMS ACTS," but being from some mistake omitted, they are introduced here merely as a continuation of that title.]

REVERSION AND REVERSIONERS.

See ACTION, 2.—ESTATE, 6.—EXECUTION, 22.—HIGHWAY, 7, 8, 9.—NUISANCE, 2, 3.

REVIEW (COURT OF).

See INSOLVENT ETC., 24.—PROHIBITION, 1.

REVOCATION.

I. OF AGENT'S AUTHORITY.

See AUCTION ETC., 4.—PRINCIPAL AND AGENT, 2, 4.

II. OF WILLS.

See TITLE, 9.—WILL, 12.

RIDEAU CANAL.

See CROWN GRANT, 10, 11.

Defence under the act—What necessary to be shewn.]—1. If a defendant rest his defence on his acting under the Rideau Canal Act, he should be prepared to prove that the act he justifies was regularly done under the statute, and not rely merely on his being employed in the construction of the canal. *Phillips v. Redpath et al.*, Dra. Rep. 72.

Quarrying stone—Rights of contractor.]—2. A contractor or workman entering upon land to quarry stone

under the Rideau Canal Act, gains no property in the stone by severing it from the freehold: when it is quarried it belongs to the Crown, or if the Crown do not take it, to the owner of the land, and therefore an assignment by the workman who quarried the stone is void. *Mittleberger v. By*, ii. O. S. 345.

Trover for detaining lumber.]—3. Trover lies against a lock keeper on the Rideau Canal for not delivering up lumber seized and detained by him under the provisions of the Rideau Canal Act, (8 Geo. IV. ch. 1,) for obstructing the navigation, on a tender of the charges occasioned by such seizure and the removal of the obstruction. *Gould v. Jones*, iii. O. S. 53.

RIENS IN ARREAR.

See REPLEVIN ETC., 5, 8.

RIGHT OF REDEMPTION.

See EXECUTION, 11.—MAINTENANCE (STATUTE OF), 7.—MORTGAGE, 5, 13.

RIGHT OF WAY.

See EASEMENT, 1.—HIGHWAY.

RIGHT TO BEGIN.

See APPEAL, 3.—ONUS PROBANDI.

RULE FOR JUDGMENT.

See EJECTMENT, II. 3, 4.—JUDGMENT, 16, 17.

RULE OR SUMMONS TO COMPUTE.

See ATTORNEY, IV. 4.—PRACTICE, II. 8.

RULE TO DISCONTINUE.

See PRACTICE, II. 40.

RULE TO PLEAD.

See INFORMATION, 3.

RULES, ORDERS AND SUMMONSES.

See PRACTICE, II.

SALE.

See AUCTION AND AUCTIONEER.—BOUGHT AND SOLD NOTES.—HORSE. SHERIFF'S SALE.—SUNDAY, 2.—TAXES, *passim*.

SALE OF OFFICES.

See BOND, I. 11.

SALTFLEET.

See BINBROOK.

SATISFACTION.

See INTEREST, 1.

Cross verdicts.]—A. being in execution at the suit of B., recovered against B. a verdict for a smaller sum: *Held*, that proceedings in A.'s action against B. should be stayed on B.'s acknowledging satisfaction on his judgment for the amount of A.'s verdict against him. *Bethune v. Brown*, Mich. Term, 7 Wm. IV.

SCHOOL ASSESSMENT.

See DIVISION COURT, 1.

SCHOOL TRUSTEES.

See COMMON SCHOOLS.

SCIRE FACIAS.

See AMENDMENT, III. 13.—BAIL, II. 9.—BOND, II. 17.—EXECUTOR ETC., III. 2.

Against an heir.—1. A scire facias will not issue against an heir under the provisions of the 5th Geo. II., although an execution may have issued against the goods and chattels in the hands of the administrator, and a return of nulla bona has been made. *Paterson v. M'Kay*, Tay. U. C. R. 47.

Irregular judgment on sci. fa.—Sheriff's deed.—2. A judgment on sci. fa. against B., the heir of the deceased owner of the land, and a fi. fa. thereon, awarding the sale of lands of which the deceased was seized on a specified day, previous to which he had died, will not sustain a purchase and a sheriff's deed under such judgment, and the fi. fa. gives no title. *Varey v. Muirhead*, Dra. Rep. 498.

Administrator not allowed to revive a judgment pending an appeal to the King in Council.—3. An administrator will not be allowed to revive a judgment in favor of his intestate, pending an appeal to the Court of the Governor in council, or the King and privy council, in the original action, although it be proved by affidavit that the plaintiff in whose favor judgment was given in the Court below, died after judgment, and before the allowance of the appeal to the King in council, though after the allowance of that to the Governor and council. *Washburn v. Powell*, ii. O. S. 463.

Execution issued on a judgment more than a year old, without a sci. fa.—4. The Court refused to set aside upon motion a ca. sa. which had been issued upon a judgment more than a year old, no sci. fa. having issued to revive it, although it was held that the ca. sa. was clearly irregular, yet not void, but voidable, and that the proper remedy would seem to be a

writ of error. *McNally v. Stevens*, Tay. U. C. R. 355.

5. If a judgment be more than a year old it is irregular to issue an execution upon it without a scire facias, even though a writ of fieri facias has been issued, but not returned and filed within the year. *Sewell v. Thompson*, Easter Term, 2 Vic., and *Wilson v. Jamieson*, Easter Term, 7 Vic.

Stay of proceedings on a sci. fa. against a surety.—6. The Court stayed proceedings on a sci. fa., on a bond to the Queen, against a surety for the due performance of the duties of a post office by a deputy post-master, to recover a large sum of money which he had not accounted for, where it appeared that the deputy post-master was in good circumstances when the default was made, and the deputy post-master general had at that time taken security from him for the amount without the knowledge or consent of the surety, who was not informed of the circumstance until three years after, when the deputy post-master had become insolvent, the scire facias having been issued also for the benefit of the deputy post-master general, who had taken the security from the defaulter to reimburse him for the amount of the defalcation which he had paid, his securities having turned out unproductive in part. *Regina v. Bonter*, Mich. Term, 7 Vic.

SCOTLAND.

See ABSCONDING DEBTOR, 23.

SEA.

See CROWN GRANT, 9.

SEAL.

See BON., II. 9.—CORPORATION, 10, 11.—FOREIGN COURTS.—FOREIGN JUDGMENT, 2.—OYER.—PROCESS, 9.—WARRANT, 2.

A circular flourish with the word "seal" inscribed, is not a legal seal. *Nagle v. Kilts*, Tay. U. C. R. 364.

[As to what is or is not a seal, see the case of *The Queen v. The Inhabitants of St. Pauls, Covent Garden*, 7 Q. B. 232, where the impression was made in ink with a wooden block in the usual place of the seal; also, a very recent case in our own Court of Queen's Bench—that of *Donaldson v. Clement*, decided in Mich. Term, 15 Vic., but not yet reported.]

SECURITY FOR COSTS.

See WAIVER, 1.—WITNESS, 10.

Plaintiff a prisoner.—1. Where a defendant applied for security for costs, by affidavit dated 22nd May, and one of the plaintiffs deposed in an affidavit on 31st June that he was resident at Kingston, where in fact he was in gaol, the Court ordered security. *Bastable et al. v. Mowatt*, Tay. U. C. R. 677.

Affidavit.—2. Where the plaintiff has left the province, the affidavit requiring security for costs should state that he has become a stationary resident in a foreign jurisdiction. *Micklejohn et al. v. Holmes*, Tay. U. C. R. 43.

Appearance to sustain motion.—3. The defendant's attorney entering common bail, is a good appearance to sustain a motion for security for costs. *Grace v. Meighan*, Dra. Rep. 196.

Military officer out of Canada.—4. A military officer on duty out of Canada and suing as plaintiff, must, upon the usual affidavit, give security for costs. *Tripp v. Fraser*, i. U. C. R. 253.

SEDUCTION.

See NEW TRIAL, II. 10; IV. 6, 13, 14; VIII. 16.

Form of action.—1. Trespass or case will lie for seduction. *Cavan v. Walsh*, Mich. Term, 1 Wm. IV.

[Acc. *Chamberlain v. Hazlewood*, v. M. & W. 515.

If a rape, no action for seduction will lie.—2. An action for seduction will not lie, where the defendant has had connexion with the seduced against her will, (Macaulay, J., doubting whether the evidence in this case proved a rape or not). *Vincent v. Sprague*, iii. U. C. R. 283.

3. Whenever, in a civil action for seduction, it turns out upon the trial that the act complained of was not merely a trespass, but, as in the last case, a felony, the learned judge must direct an acquittal: *Held*, however, that in this case, the evidence being considered unsatisfactory, the learned judge was justified in not directing a verdict for the defendant. *Brown v. Dalby*, vii. U. C. R. 160.

Rape—Subsequent connexion—Right of action.—4. Case for seduction will lie to recover damages arising from subsequent connexion, though the evidence strongly tend to shew that the defendant had in the first instance committed a rape on the girl. *Hayle v. Hayle*, iii. O. S. 295.

Affidavit under the statute, when necessary.—5. In an action by a father for the seduction of his daughter while she was living with a third person, it is not necessary to prove that an affidavit of the seduction by the defendant was made by the daughter, and filed according to 7 Wm. IV. ch. 8, sec. 4. *Gill v. Brown*, Easter Term, 4 Vic.

Action under 7 Wm. IV. ch. 8—Averment of action being brought under the statute.—6. In an action on the case by a father for the seduction of his daughter, who was not living with him at the time of the seduction, it is not necessary, under the provincial statute 7 Wm. 4, ch. 8, which says that in such a case service by the daughter will be presumed, to aver in the declaration that the action is brought under that statute. *M'Lain v. Ainslie*, Mich. Term, 6 Vic.

Right of father to sue.—7. The father of an illegitimate daughter cannot, under our statute 7 Wm. IV. ch. 8, bring an action for seduction merely on the ground of being her father. *Biggs v. Burnham*, i. U. C. R. 166.

Right of master to sue.—8. The statute 7 Wm. IV. ch. 8, restrains the master of an unmarried female from suing for her seduction, until six months have elapsed from the birth of the child, and it be first seen whether the father or mother of the female within that time (not having abandoned her before her seduction) intend bringing the action. *Whitfield v. Todd*, i. U. C. R. 223.

[The right of a master to sue for the seduction of a servant does not pass to the master's assignees on his bankruptcy. *Howard v. Crowther*, viii. M. & W. 601.]

Right of mother.—9. The mother of an illegitimate daughter may maintain an action for her seduction. *Muckleroy v. Burnham*, i. U. C. R. 351.

Action by parent before birth, when seduced living with a stranger.—10. Under the provincial statute 7 Wm. IV. ch. 8, seduction followed by pregnancy, entitles the parent, even before the birth of the child, and to the exclusion of any other party, to maintain an action, although the daughter had from tender years been living in the family of a stranger, and continued there to reside up to the time of bringing the action. (Draper, J., dissente). *L'Esperance v. Duchene*, vii. U. C. R. 149.

Plea, leave and license of daughter.—11. The plaintiff declared in trespass in the first count, complaining of breaking and entering his close and debauching of his daughter only, and the defendant pleaded to each count as to all but the force and arms, &c., the leave and license of the daughter—the pleas were held bad on demurrer. *Ross v. Merritt*, ii. U. C. R. 421.

Evidence to contradict statements of party seduced.—12. In an action

for seduction, where the female seduced has denied on her examination that she had criminal intercourse with others besides the defendant, the defendant can only be allowed to shew in answer to that that to the knowledge of his witnesses that statement was not true; he cannot be permitted to ask them whether they themselves had connexion with her. *McMahon v. Skinner*, ii. U. C. R. 272.

Proof of defendant being father of child requisite.—13. To sustain an action on the case for seduction, stating the debauching of the plaintiff's daughter and servant, whereby she became pregnant, and laying consequential damages for loss of service, the plaintiff must prove the defendant to have been father of the child, mere proof of seduction by the defendant will not be sufficient. *Kimball v. Smith*, v. U. C. R. 32.

SEIZIN IN FEE.

See COVENANT, I. 1, 6; II(2), 3, 12. ESTOPPEL, 5.—EXECUTION, 14.—HEIR, 5.

SENTENCE.

See CRIMINAL LAW, 4.

SERVICE OF PAPERS.

See APPEARANCE, 1.—ATTORNEY, IV. 4.—CANADA COMPANY.—EJECTMENT, III.—IRREGULARITY, 2, 9, 15, 18.—JUDGMENT AS IN CASE OF NONSUIT, IV. 2.—NEW TRIAL, VI. 2.—NOTICE OF ACTION, 13.—NOTICE OF ASSESSMENT, 1.—NOTICE OF TRIAL, 3, 10, 11, 15.—NOTICE TO PRODUCE, 2, 3, 5, 6.—PRACTICE, I. 1, 8, 23; II. 8; III. 6, 7, 10.—PROCESS, passim.—REPLEVIN ETC., 3.—TESTATUM ACT, 1.

SET OFF.

See ARBITRATION AND AWARD, VI (2), 15.—AUCTION ETC., 6.—BOND, II. 2.—COSTS, IV(1), 2, 4; VIII. 4.—DE INJURIA, 1.—DISTRICT COURT, 6.—DOWER, III. 6.—ESTOPPEL, 9.—PRACTICE, I. 32.—SATISFACTION.

Set off of a sum paid to a third party after action brought.]—1. Where after declaration filed and pleas of general issue and set off pleaded, the plaintiff agreed with the defendant that if the defendant would pay a demand on a note in favor of a third party, the plaintiff would allow it in the action against the defendant, and the defendant did pay it, and such payment, with the other items of set off, overbalanced the plaintiff's account: *Held*, that the settlement of the demand against the plaintiff by the defendant was a payment, and could not be treated as a set off, having been made after action brought; and that, as without it the plaintiff's claim was the larger, he was entitled to a verdict with nominal damages. *Sherwood v. Campbell*, Hil. Term, 6 Wm. IV.

[See case 12, *infra*.]

Notice of, when to be given.]—2. A notice of set off cannot be given before the plea of the general issue is filed. *Bickerstaff v. Merchant*, Hil. Term, 2 Vic.

Set off of judgments.]—3. A judgment obtained by a principal cannot be set off against a judgment obtained by his debtor against one of his sureties. *Gray v. Smith*, Hil. Term, 2 Vic.

Declaring so as to deprive the defendant of a set off.]—4. A plaintiff cannot, by declaring specially, where he could recover on the money counts alone, deprive the defendant of his right of set off. *Miller v. Munro*, Mich. Term, 3 Vic.

Action by executrix against a sheriff—Set off against her in her own

right.]—5. Where in an action by an executrix against a sheriff for money had and received to her use as executrix on a writ of fieri facias against one D., which when produced recited a recovery by the plaintiff executrix against D. for not performing certain promises and undertakings made to the plaintiff and for her costs &c., and the defendant offered to give in evidence a set off against the plaintiff in her own right: *Held*, that it was inadmissible, the plaintiff claiming in her representative character, although the writ of fieri facias was informally worded. *Devlin v. Jarvis*, Easter Term, 3 Vic.

[Also see case 11, *infra*.]

Plea of a less sum than claimed, averring it to be greater.]—6. Where to a declaration in assumpsit claiming 400*l.* on counts for goods sold &c., the defendant pleaded as to the promise and undertakings a set off of a less sum than the amount alleged to be due from him to the plaintiffs, and averred that his set off exceeded the monies due and owing from him to the plaintiffs, and offered to set off and allow the plaintiffs, out of the defendant's damages, so much damage as the plaintiffs had sustained on occasion of the not performing the promises &c. in the declaration: *Held*, bad on special demurrer, for not offering to deduct the defendant's set off instead of pleading it in bar. *Jarvis et al. v. Dickson*, Trin. Term, 3 & 4 Vic.

Subsequent action for subject matter of set off in a previous action.]—7. Where two masons brought an action for work and labor against their employer and recovered a verdict for 60*l.*, it was held that the employer could not afterwards bring an action against them for money he had paid them on account, and which he had attempted to prove on the former action. *Hunt v. M'Carthy et al.*, Trin. Term, 5 & 6 Vic.

Promissory note not due till after service of the writ.—8. A promissory note made by the plaintiff to the defendant, falling due after the service of the plaintiff's writ, but before declaration filed, may be set off in the action. *Thorne v. Haight*, Hil. Term, 6 Vic.

Verdict against several defendants—Set off against plaintiff by one of them.—9. One of several defendants in a cause, against all of whom a verdict had been recovered, was allowed, on a summary application after judgment, to set off the amount of a judgment which he had recovered against the plaintiff against the plaintiff's judgment against him and his co-defendants, saving to the attorney his lien for costs. *Fortune v. Hickson et al.*, i. U. C. R. 408.

Action on note—Set off for goods sold on a contract out of which note arose.—10. To an action on a promissory note the defendant pleads a set off for goods sold and delivered, but evidence at the trial shews that the set off is confined to the special contract for the sale and delivery of goods out of which the note had arisen: *Held*, that the goods so delivered could not form the subject matter of a set off, but that the plaintiff ought to have been sued on his special undertaking. *Mathewson v. Carman (Daniel)*, i. U. C. R. 266.

Action against an executor—Set off of an individual debt.—11. To an action of assumpsit on the common counts against an executor on his testator's promise, defendant pleads a set off due to him from the plaintiff for goods sold and money paid by the defendant, as executor of the testator, to the plaintiff. The plea is bad—the defendant attempting to set off an individual debt against a demand due from him in his capacity of executor. *Gracey v. Wilson*, i. U. C. R. 237.

Payments to third parties at plaintiff's request, a set off.—12. Where

a defendant pays for plaintiff orders in favor of third parties, such payments may be given in evidence as items under a set off, and need not, in order to their admission in evidence, be pleaded as payments on account. *McLellan v. McManus*, i. U. C. R. 271.

Irregularity in delivery of particulars—Waiver.—13. Where a defendant delivers his particulars of set off on a day later than that appointed by judge's order, and the plaintiff's attorney (through his clerk), accepts the particulars, keeps possession of them, and gives no notice of his refusing to receive them as not in time, such conduct is a waiver of all objections on the ground of delay to the defendant's right to go into evidence of his set off. *Ib.*

Action under 5 Wm. IV. ch. 1—Set off of separate debt of plaintiff.—14. If the holder of a promissory note sue the maker and indorser in a joint action, under 5 Wm. IV, ch. 1, the separate debt of the plaintiff to the maker or indorser cannot be set off under a joint plea of set off. *Paterson v. Howison et al.* ii. U. C. R. 139.

Admissibility of evidence under plea of,—15. In an action of assumpsit for work and labor, &c., the defendant pleaded a set off for money had and received, &c., and at the trial attempted to give in evidence the receipt of money by the plaintiff for him, which it was shewn was received according to the condition of a bond, upon which the defendant had commenced an action against the plaintiff: *Held*, that such evidence was not admissible to establish the plea. *Denison v. Donnelly*, ii. U. C. R. 391.

Action by auctioneer—Set off as between purchaser and the party for whom auctioneer sold.—16. To an action by an auctioneer against a purchaser for goods sold, the purchaser pleaded that A. delivered the goods to the auctioneer to sell; that A. was the

agent of B., to whom the goods belonged, and that he (the purchaser), had a set off against B., which he pleaded. *Quære*: Could the purchaser plead this set off against B., without further alleging that the auctioneer sold these goods to him as the auctioneer of B.? (Robinson, C. J., was of opinion that he could not.—Jones, J., contra.—Macauley, J., and McLean, J., gave no opinion on this point, as the decision of the Court upon the other points decided the demurrer in the plaintiff's favor). *Wakefield v. Gorrie*, v. U. C. R. 160.

Set off on special agreement.]—17. Declaration on the common counts.—Plea, a set off on the common counts, and also upon a special agreement under seal, to give the defendant so much per cord for cutting wood, and alleging that so many cords of wood had been cut: *Held*, to that part of the plea of set off relating to the special agreement, that the plea was good. *Geddes v. McCracken*, v. U. C. R. 573.

Order for delivery of particulars—Rejection of evidence.]—18. Where the defendant had been ordered to deliver particulars of any credit claimed by him by the 17th September, and he did not deliver them until the 26th of September: *Held*, that he was restrained by such order from putting in evidence a letter from plaintiff, admitting a set off in the shape of money received to the defendant's use. *Campbell v. Gzowski*, vii. U. C. R. 412.

SEVERAL COUNTS.

See PRACTICE, I. 17.

SEVERAL PLEAS.

See BOND, II. 2.—PRACTICE, I. 17, 25.

SHERIFF.

SHERIFF.

See DEPUTY SHERIFFS.

- I. DUTIES, RIGHTS AND LIABILITIES.
- II. ATTACHMENTS.
- III. ACTIONS AGAINST SHERIFF.
- IV. ACTIONS BY SHERIFF.
- V. ACTIONS AGAINST, AND LIABILITY OF, SURETIES.
- VI. FEES.

I. DUTIES, RIGHTS AND LIABILITIES.

See AMENDMENT, I. 8.—BAIL, I. 8. BANKRUPT ETC., 7.—BOND, I. 8, 11. DISTRESS, I. 15.—DISTRICT COURT, 8.—ESCAPE, *passim*.—FALSE IMPRISONMENT, 8.—FALSE RETURN, 1, 7, 8, 9, 10, 12.—INDEMNITY BOND, 2, 3, 13, 14.—INTERPLEADER.—LEAVE AND LICENSE, 1.—SHERIFF'S SALE, 19.

Duty upon writs of execution after levy.]—1. It is the duty of a sheriff who levies money under a *fi. fa.* to pay it over to the party entitled thereto; he cannot return the writ to the Crown office and pay the money into the hands of the clerk of the Crown, and thereby discharge himself from liability to the plaintiff in the original suit. *Shuter et al. v. Leonard*, iii. O. S. 314.

[See div. II. 10, *infra*.]

Duty in arresting on ca. res.]—2. Where a *ca. re.* is delivered to the sheriff he is bound to proceed with due diligence in the arrest of the party. *O'Connor v. Hamilton*, iv. U. C. R. 243.

Duty after attempting to arrest and failure.]—3. Where the sheriff has once attempted to make an arrest and failed, he is not bound to make another attempt, unless when he has express notice where the debtor is. *Rigney v. Ruttan*, Hil. Term, 2 Vic.

Seizure under Absconding Debtor's Act—When a trespasser.]—4. Where

A. being indebted to B. and C., and being insolvent was about to leave the country, but desired to secure to B. the debt he owed him, and instructed his clerk to that effect, who after A.'s departure made an assignment of his goods to B. without B.'s knowledge or consent, and before B.'s consent was received the goods were seized by a sheriff on an attachment issued at the suit of C.: *Held*, that the sale to B. was not complete until his assent was received, and that the sheriff having seized the goods before such assent, could not be treated as a trespasser. *Barrett v. Rapelje*, iv. O. S. 175.

Sale of defendant's goods on his own premises, a trespass.]—5. A sheriff is a trespasser, if after the seizure of a defendant's personal property under an execution, he enters upon his premises and sells the property there. *McMartin v. Powell et al.*, Easter Term, 3 Vic.

6. A sheriff, under a writ of venditioni exponas, has no right to enter upon a person's land and sell his goods there by public auction; and a purchaser who enters at the same time as the sheriff is a trespasser as well as the sheriff. *McMartin v. McPherson*, Mich. Term, 3 Vic.

Attachment for contempt—When sheriff may take bail to the limits.]—

7. *Semble*: That before the return of a writ of attachment for contempt the sheriff cannot properly take bail for the appearance of a party, without the order of a judge; but after the return, if the party be upon attachment merely to compel the payment of money, the sheriff as of course may take bail to the limits. *Lane v. Kingsmill*, vi. U. C. R. 579.

Notice to clerk—Liability of sheriff.]—

8. A plaintiff's attorney giving notice to a sheriff's clerk that A. and B. are jointly interested in certain goods, and pointing to a deed in his possession, which he says shews the joint interest of the parties, is not necessarily

a notice which will bind the sheriff in executing the writ. *Semble*, that the duties of the clerk to whom the notice was given, and the whole circumstances of the case, must be considered in determining, under the notice, the liability of the sheriff. *O'Neill v. Hamilton*, iv. U. C. R. 294.

Inconsistent notices.]—9. If the plaintiff's attorney give at different times two wholly inconsistent notices to the sheriff—*Semble*, that the sheriff is not bound to obey either the one or the other. *Ib.*

Execution against partners, one a bankrupt.]—10. *Quære*: What course is the sheriff to pursue upon an execution against the goods of one of two partners, under the circumstances of one being a bankrupt and the other not? *Ib.*

Sale of lands by old sheriff after new sheriff in office.]—11. *Quære*: Under what circumstances the old sheriff or his deputy may proceed to sell lands which had been advertized under a writ of fi. fa. before the new sheriff came into office.—See *Campbell v. Clench*, i. U. C. R. 267.

Return of writ by deputy.]—12. The sheriff is bound by the return to a writ of fi. fa. made in his name by a person who, though deputy sheriff at the time he signed the sheriff's name to the return, was not deputy until after the time when the writ was returnable. *Baby v. Foott*, iv. U. C. R. 349.

Amendment of return to writ after action brought for escape—How sheriff may be relieved.]—13. After an action has been brought against a sheriff for an escape in execution, he will not be allowed to amend his return to the writ on which the debtor was in custody when the escape was made, by shewing that he was privileged from arrest, so as to oblige the plaintiff to have recourse to the original defendant; but the Court will direct that the plaintiff shall assign the original judgment to the sheriff, so that he may

proceed in the plaintiff's name, first indemnifying him against damages and costs in consequence of the assignment. *Hervey v. Sherwood*, Trin. Term, 3 & 4 Vic.

Adverse claims—Right to indemnity.—14. A sheriff, whenever there is an adverse claim to goods as between the execution debtor and a third party, may take an indemnity bond from either one or the other, or both the parties. *Thomas v. Johnston et al.*, iv. U. C. R. 110.

Liability on informal commitments directed to gaoler.—15. *Semble*: That a sheriff is not liable in trespass on commitments by magistrates directed to the gaoler that turn out to be informal and insufficient, unless he has become in some way a party to the imprisonment. *Fergusson v. Adams et al.*, v. U. C. R. 194.

How far sheriff bound by his return.—16. As a general rule, the sheriff is bound by his return to a writ of *fi. fa.*, but not in all cases; he would not be bound by it, for instance, when a verdict has passed against him on such return and shewn it incorrect. *Houlditch v. Corbett*, vi. U. C. R. 549.

Liability for not returning a writ of fi. fa. till ruled to do so.—17. The Court will not fix a sheriff with the debt merely because he has not returned a writ of *fi. fa.* until after he has been ruled to do so. The plaintiff in execution will be left to his remedy by action against the sheriff. *Regina v. Jarvis*, vi. U. C. R. 558.

In contempt for not bringing in the body—Relief.—18. The Court relieved a sheriff on payment of costs, bail being perfected, where he was in contempt for not bringing in the body, although a trial had been lost, it appearing that the sheriff was not in default for the loss of such trial, and it being sworn that the application was made solely on his behalf. *Ward v. Skinner*, iii. O. S. 235.

Discharge of prisoner—Plea, perfecting of special bail.—19. A sheriff cannot justify discharging a prisoner from custody surrendered to him by the bail before the return of the writ, by pleading the perfecting of special bail, without shewing at the same time that the plaintiff had notice of the special bail and of their justification. *Shouldice v. Fraser*, vii. U. C. R. 60.

Right to retain monies made on plaintiff's execution, to satisfy a claim of his own.—20. A sheriff will not be allowed to retain money which he has made on an execution, on the ground that he has himself a claim for the amount retained against the plaintiff who has absconded, when the plaintiff's attorney is the person entitled to receive it in consequence of advances made to the plaintiff. *Burnham v. Manners*, ii. U. C. R. 94.

Right to question the party's title from whom the goods taken.—21. A sheriff who has wrongfully seized goods in execution, cannot call in question the right of the party from whose possession the property was taken by him, as that it was received under an assignment fraudulent as against creditors. *Cook v. Jarvis*, iv. O. S. 250.

21 Jac. I. ch. 12.]—22. The 21 Jac. I. ch. 12, extends its privileges to sheriffs when acting under the commands of the justices. *Fraser v. Dickson*, v. U. C. R. 231.

24 Geo. II. ch. 24.]—23. *Semble*: That the sheriff, though a superior officer to the gaoler, comes equally within the benefit of the 24 Geo. II. ch. 24. *Fergusson v. Adams et al.*, v. U. C. R. 194.

II. ATTACHMENT.

See BAIL, III. 5.—INTERPLEADER, 5. VENTIONI EXPONAS, 5.

Rule to return writ not issuable from a deputy's office.—1. A rule to return a *fi. fa.* cannot issue out of the

office of the deputy clerk of the Crown in an outer district. *Anonymous*, Dra. Rep. 246.

Rule may issue in vacation—Costs, if writ not returned in time.]—A rule to return a writ may issue in vacation; and if the sheriff do not return the writ within the time limited by the rule, the Court will impose the costs of the rule upon him, unless under very peculiar circumstances. *McGowan v. Gilchrist*, Hil. Term, 7 Vic., P. C., McLean, J.

Rule to return writ—Effect of subsequent stay of proceedings by plaintiff's order.]—2. A party who has ruled a sheriff to return a writ, and afterwards given an order to stay proceedings for a certain time, cannot after the expiration of that time, the writ not having been returned, proceed by attachment under that rule. *Bergin v. Hamilton*, Mich. Term, 2 Vic.

Informal return of writ.]—3. Where a sheriff had returned a writ in an informal manner, the Court refused an attachment in the first instance. *Bayman v. Struther*, Tay. U. C. R. 42.

[See *Harper v. Powell*, 9, *infra*.]

Attachment set aside for irregularity—Second attachment.]—4. Where a sheriff returned cepi corpus, and was ruled to bring in the body and attached for not obeying the rule, and the attachment was set aside for irregularity, and while it was in existence the defendant in the action had been discharged by supersedeas bail having been put in, but the rule of allowance was not served: *Held*, that a second attachment against the sheriff on a second rule to bring in the body, issued eight months after the setting aside of the first attachment and the debtor's discharge, was irregular; and the Court ordered it also to be set aside. *Rex v. Sheriff of Niagara*, ii. O. S. 126.

Second attachment refused till costs of former one paid.]—5. A second attachment against a sheriff for not

bringing in the body after a rule on a return of cepi corpus, was refused, until the costs of setting aside a former one for irregularity were paid. *Rex v. Ruttan*, Easter Term, 6 Wm. IV.

Attachment obtained after settlement, set aside without costs.]—6. Where an attachment was obtained against a sheriff for not returning a writ after a settlement of the plaintiff's claim before the rule was issued, the attachment was set aside, but without costs, as the sheriff should have come in and applied to set aside the rule. *Polton v. Wells (Administrator of)*, Hil. Term, 7 Wm. IV.

Sheriff, a member of parliament.]—7. An attachment was granted against a sheriff who was a member of parliament, for not returning a writ pursuant to a rule of Court. *Bell v. Buchanan*, Mich. Term, 1 Vic.

Insufficient returns, no returns.]—8. An insufficient return is no return, and the course is to move for an attachment, not to quash the return. *Eastwood et al. v. McKenzie*, Hil. Term, 2 Vic., and *Regina v. McLeod*, Mich. Term, 3 Vic.

[Also, case 19, *infra*.]

Informal return to ven. ex.]—9. An attachment may issue against a sheriff for returning "goods on hand" to a writ of venditioni exponas. *Harper v. Powell*, Easter Term, 2 Vic.

Writ returned but not filed—Attachment.]—10. Where a sheriff, on being ruled to return a writ of execution, returned it by post to the Crown office, where it was not filed because the postage on the letter was unpaid, and the plaintiff with notice of these facts, obtained a rule for an attachment on the usual affidavit of search, the Court set the attachment aside, but only on payment of costs, as the sheriff was bound to have paid the postage, to make his return effectual. *Regina v. Moodie*, i. U. C. R. 410.

Attachment for costs of rule.—11. A sheriff cannot be attached for non-payment of the costs of a rule to return a writ under 3 Wm. IV. ch. 9, unless there has been a rule specially calling on him so to do. *Marcy v. Butler*, Hil. Term, 2 Vic., and *Doe dem. McGregor v. Grant*, Trin. Term, 2 & 3 Vic.

12. Where a sheriff being ruled to return a writ, enclosed it to the clerk of the Crown three or four days after the rule expired, so that it was not in the files when the search was made, but was produced in open Court by the clerk, the Court refused an attachment for the purpose of making him pay the costs. *Andrews v. Robertson et al.*, iii. O. S. 304.

Rule issued on same day as writ returnable.—13. An attachment will not be granted against a sheriff for not returning a writ pursuant to a rule to return it issued on the same day as the writ was returnable. *Regina v. Hamilton*, Easter Term, 2 Vic.

Attachment an irregular rule.—Setting aside same.—14. The sheriff cannot be served with a rule to return a writ until the return day is past. Where an attachment has been issued on such an irregular rule, the proper course is to move to set aside the attachment, and not the irregular rule upon which the attachment has been founded. *Regina v. Jarvis*, iii. U. C. R. 125.

Rule obtained after return of writ, discharged.—15. A rule to return a ca. re. was issued in Trin. Term.—In July following the writ appeared to have been in the hands of the plaintiff's agent, and in August the attachment issued: the Court discharged it on paying costs up to the time it was returned, although a trial had been lost. *Rex v. Sherwood*, iii. O. S. 305.

Attachment for not paying over money—Grounds for opposing.—16. It is a good ground to prevent the summary interference of the Court by

attachment against a sheriff for not paying over money, that the money has been attached in the hands of the party not paying over, under the Absconding Debtor's Act. *Powers v. Scott*, Hil. Term, 3 Vic.

Attachment against ex-sheriff six months out of office.—17. The Court will not order an attachment against a sheriff who has been more than six months out of office before rule issued against him, for not giving an account of sales made and monies received from a defendant on writs against his lands, although the rule directing the sheriff to render such an account had before been granted. *Ladd v. Burwell et al.*, Easter Term, 3 Vic.

[Also see case 20, *infra*.]

For not returning writ although indemnity demanded and refused.—18. Where a sheriff had three writs of execution against the personal property of a defendant, and having seized and sold, had partly satisfied the first and third writs, when a stranger claimed the property, and the plaintiff on the second writ refused to give the sheriff an indemnity, and the sheriff did not return his writ, an attachment was granted against him for not returning the writ. *Land v. Burn*, Trin. Term, 3 & 4 Vic., P. C. Macaulay, J.

Attachment for insufficient return.—19. An attachment may be granted against a sheriff for an insufficient return. *Smith v. Bellows*, Hil. Term, 4 Vic., P. C. Jones, J.

Against sheriff more than six months out of office.—20. An attachment will not be granted against a sheriff for not returning a writ, when he has been out of office for more than six months before the rule to return the writ issued. *Mott v. Gray et al.*, i. U. C. R. 392.

For not returning writ, after failure of an intended compromise.—21. Where after the delivery of a writ against lands to a sheriff, the plaintiff and defendant agreed to compromise,

and after a delay of more than two years, the compromise was not effected, and the plaintiff obtained a rule for an attachment against the sheriff for not returning the writ, the Court set the rule aside. *Crooks v. O'Grady*, i. U. C. R. 400.

Sufficiency of grounds for opposing rule.]—22. It is no sufficient ground for opposing a rule for an attachment for not returning a writ of execution against goods, that there is a question pending before the Court respecting the title to those goods. The sheriff should in such a case apply to have the time extended for making his return until the question of property be decided. *Stull v. McLeod*, i. U. C. R. 402.

23. Where a sheriff returns cepi corpus to a writ of ca. sa., and the plaintiff rules the sheriff to bring in the body, and the sheriff not complying with the terms of the rule the plaintiff then obtains a rule for an attachment against the sheriff for not bringing in the body of the defendant at the return of the rule to that effect: *Held*, that it is a good answer to such rule for an attachment, to shew by affidavit that the defendant was arrested under a ca. sa. and placed in close custody, and was afterwards discharged from close custody and admitted to the limits by virtue of a certificate from the clerk of the Crown and pleas annexed to the affidavit, and that he had not since been committed to close custody by any process whatever. *White v. Petch et al.*, vii. U. C. R. 1.

Impertinent return, a contempt.]—24. Impertinent matter in a return to a writ is considered as a contempt in the sheriff. *Jones v. Schofield*, Tay. U. C. R. 610.

Power of Judge in chambers.]—25. An attachment against a sheriff for not obeying a rule cannot be granted by a judge at chambers. *Rez v. Sheriff of Niagara*, Dra. Rep. 343.

26. *Quere*: Can a judge in chambers pass judgment upon a sheriff for contempt, under our statute 7 Vic. ch. 33, after the object of the statute has been attained by the return of the fi. fa.? *Regina v. Jarvis*, vi. U. C. R. 558.

Relief by allowing return of writ.] 27. The Court will sometimes, under special circumstances, relieve a sheriff by allowing the return of a writ, even after a motion has been made to bring in his body on the coroner's return of cepi corpus, to the attachment issued against the sheriff for not returning the writ. *Regina v. Jarvis*, i. U. C. R. 415.

Return before attachment—Relief.]—28. *Semble*: That when a sheriff returns a writ before the attachment issues, but not within the time limited by the rule, he can only be relieved upon payment of costs. *Bank of Upper Canada v. McFarlane et al.*, iv. U. C. R. 396.

III. ACTIONS AGAINST SHERIFF.

See ACTION, 2, 3.—DE INJURIA, 7. ESCAPE.—FALSE RETURN.—HEIR, 4.—JUDGMENT NON OBSTANTE VERDICTO, 2.—MONEY HAD AND RECEIVED, 2.—NEW TRIAL, VII. 2. REPLEVIN ETC., 15.—SET OFF, 5. TAXES, 8.—TENANCY IN COMMON, 1.—VENUE, 4.

Case for not giving public notice of sale—Pleadings.]—1. In an action on the case against a sheriff for not giving notice of the sale of effects taken in execution, at the most public place in the township: *Held*, not necessary to set out the name of such place. A statement that the defendant sold the goods without legal notice, and that he sold them for less than their real value, were not considered as distinct and independent grounds of action. *Malcolm v. Rapelje*, Tay. U. C. R. 496.

For seizing goods—Evidence.]—2. In an action against a sheriff for seizing

goods, it is sufficient to prove that they were seized colore officii, without proving a writ of execution. *Holt v. Jarvis*, Dra. Rep. 200.

Trespass for seizing goods—Justification — Necessary evidence.]—3.

In trespass against a sheriff for seizing the goods of the plaintiff under an attachment issued under the Absconding Debtor's Act against the goods of a third party, by whom they had been sold to the plaintiff before the attachment, the defence was, that the sale was fraudulent and void against creditors, under 13 Eliz. ch. 5; but the sheriff did not prove that any debt had been due from the absconding debtor to the attachment creditor: *Held*, that without the proof of this, his justification was incomplete, and that the plaintiff would be entitled to recover. *Grant v. McLean*, iii. O. S. 443.

4. Where in trespass against a sheriff for seizing the plaintiff's goods, the defence was that they were the goods of a third party, and had been seized under an attachment issued against him as an absconding debtor, but had been delivered up at the time of seizure on the plaintiffs' entering into a bond for their production when required, and afterwards they were sold at the suit of the attaching creditor on a fi. fa., the plaintiffs' having given them up according to the terms of their bond, and the plaintiffs now claimed them as their own property under an assignment from the absconding debtor prior to the attachment, which the defendant contended was fraudulent and void as against creditors, but proved no debt due to the attachment creditor, nor did he shew the judgment nor execution, relying on the bond as estopping the plaintiffs from disputing those facts; and the jury, under the direction of the judge, found for the plaintiffs; the Court, although agreeing in the direction of the judge, that the judgment and execution should have

been shewn, yet from the circumstances of the case, and on affidavits filed, shewing that the damages were exclusive, granted a new trial on payment of costs. *Powers et al. v. Rutten*, iv. O. S. 58.

Trespass for seizing cattle, &c.—Pleadings.]—5. Where in trespass for taking cattle, &c., the defendant pleads as to the first, second, third and fourth counts of the declaration, that before the time in the declaration mentioned a writ of fieri facias had been issued to him against the goods of one A., and that the defendant seized the cattle, &c., in the plea mentioned as the cattle of A., by virtue of the writ; the plaintiffs claiming them from B., to whom A. had bailed them, which were the same trespasses, &c.; and the plaintiffs replied that the defendants abandoned the seizure and re-delivered the goods to A., who by deed, of which the plaintiffs made profer, assigned and delivered them to the plaintiffs, and that afterwards, and at the time mentioned in the declaration, the defendant of his own wrong seized, &c., the same being in the plaintiffs possession by virtue of the assignment, and prayed damages by reason of the trespasses in the declaration mentioned: *Held*, that the replication was, by way of new assignment, shewing a distinct trespass from that mentioned in the plea, in point of fact and time, and that as the prayer of judgment of damages for the trespasses mentioned in the declaration, instead of in the replication, was not shewn as a cause of special demurrer, the plaintiff was entitled to judgment.—To a second plea justifying the seizure, &c., in the same manner, and that the cattle came afterwards to the plaintiffs by finding, and the plaintiffs replied that the defendant abandoned the seizure, &c., as in his other replication, without this that the cattle, &c., came to the possession of the plaintiffs by finding, the replication was held bad, as traversing

color. *Smith et al. v. Jarvis*, Easter Term, 3 Vic.

Trespass for seizing goods—Declaration—Plea.—6. In the trespass for taking goods, &c., if they be not specifically set out in the declaration, it will be bad on general demurrer; and a plea justifying the taking of the goods of A., under an execution against the goods of B., and that divers goods of B. were in A.'s possession, without averring them to be the same goods, is bad on special demurrer. *Friesman v. Donnelly et al.*, Hil. Term, 6 Wm. IV.

Trespass—Justification under executions must be pleaded.—7. Where an action of trespass is brought against a sheriff or his deputy for a seizure under writs of execution, he cannot justify under the executions, without pleading and producing them. *Stull v. McLeod*, Mich. Term, 4 Vic.

[Also, see cases 14 and 17, *infra*.]

Case for selling under value—Declaration.—8. Where an action on the case was brought against a sheriff by the plaintiffs, in a suit for selling the defendant's goods greatly under value, and no judgment was set out in the declaration, the declaration was held bad on general demurrer. *Billings et al. v. Hamilton*, Hil. Term, 4 Vic.

Deputy sheriff—Money had and received.—9. No action lies against the deputy sheriff for money received by him and paid over to the sheriff; the action must be brought against the sheriff himself. *Bird v. Hopkins*, Hil. Term, 5 Vic.

Action for selling under value—Plea.—10. Where in an action against a sheriff for not selling lands in execution for the best price that he could get for the same, but wrongfully and injuriously much below their real value, the defendant pleaded that he sold the lands for the best price that he could get for them—the plea was

held good on general demurrer. *Watson v. McDonnell et al.*, Trin. Term, 5 & 6 Vic.

Trespass de bonis asportatis—Insufficiency of justification under an execution.—11. Where to trespass de bonis asportatis against a sheriff he justified under a writ of execution, and alleged that the goods in question had been fraudulently sold and delivered to the plaintiffs by the debtor to defeat the execution; the plea was held bad, because it did not shew the judgment upon which the execution issued. *Adams et al. v. Kingsmill*, i. U. C. R. 355.

Trespass for seizing goods—Plea, not possessed—Evidence.—12. *Sem-ble*: That when a sheriff under a fieri facias seizes goods in the possession of the debtor, and a third party claims them as his under a bill of sale, which is impeached as being merely pretended and colorable—the sheriff, when sued in trespass for taking the goods, may, upon a plea that the goods are not the plaintiff's, contest his right on the ground of fraud, without proving the judgment; and the learned judge reporting that the non-production of the judgment was not objected to at the trial, the Court would not afterwards entertain the objection. *Keeser v. McMartin et al.*, iii. U. C. R. 327.

Trespass for seizing goods—Evidence of fi. fa. and judgment.—13. In an action of trespass for taking goods, brought against the sheriff acting under a fi. fa., proof of the judgment and fi. fa. by the sheriff is indispensable only in cases where the question turns exclusively upon the fact whether the goods have been fraudulently assigned by the execution debtor to the plaintiff. *Culbert v. Conger*, vii. U. C. R. 395.

Trespass for seizing goods—Execution must be specially pleaded.—14. A sheriff cannot defend himself in an action of trespass brought against him by two joint tenants, by shewing

a writ of fieri facias against the other of the joint tenants, under which the alleged trespass was committed, unless he has justified specially under the writ as a defence; but when he had omitted to do so, and a verdict was found against him, the Court granted a new trial on payment of costs, with leave to him to amend his pleadings. *Lee v. Rapelje*, ii. U. C. R. 368.

No objection by sheriff that jury summoned by himself.]—15. It is no objection on the part of the sheriff, in an action against him, that the jury have been summoned by himself and not by the coroner. *Ainslie v. Rapelje*, iii. U. C. R. 275.

Demand of surplus money on an execution before action.]—16. In an action against the sheriff by an execution debtor, for the surplus of money remaining in his hands after satisfying a fi. fa., no demand before action brought is necessary. *Ib.*

Trespass—Sheriff must plead execution.]—17. Where in an action of trespass against a sheriff for seizing and taking away goods the plaintiff proves that the sheriff took the goods out of his actual possession, the defendant cannot give evidence of his legal authority to seize them under a fi. fa., without pleading it. *Pollock et al. v. Fraser*, iv. U. C. R. 352.

Justification under fi. fa.—Seizure before return of writ.]—18. A plea justifying an action of trespass in seizing goods, &c., under a writ of fi. fa., must shew that the goods were seized before the return of the writ. *Outwater v. Daffoe*, vi. U. C. R. 256.

Action for not arresting—Damages.]—19. If a jury, upon being charged that they were not to find for the plaintiff unless they were satisfied that there had been neglect on the part of the sheriff from which the plaintiff had suffered some damage, return a nominal verdict in favor of the plaintiff, the Court will refuse to set it aside on the ground that, even to sustain a

verdict for nominal damages for not arresting a defendant upon meane process, some clear proof of an injury received from the neglect to arrest should have been given by the plaintiff, and that no such evidence was offered. *O'Connor v. Hamilton*, iv. U. C. R. 243.

Trespass—Statement of judgment and writ in justification.]—20. A plea of justification under a writ of fi. fa. in trespass for taking goods, is bad, if it state the writ to have been issued before judgment was entered. Since the rule which requires the judgment to be entered of a particular day, the issuing of the writ upon it should be averred of the day it actually issued, with the statement "tested of" the day in term on which it is tested. *Dougall v. Moodie*, i. U. C. R. 374.

Trespass—Two distinct trespasses—Justification of both under one writ.]—21. Where in a declaration in trespass containing two counts, charging two distinct trespasses in taking different goods at different times, the defendant justifies the two distinct under one writ: *Held*, plea good. *Cameron v. Lount*, iii. U. C. R. 453.

IV. ACTIONS BY SHERIFF.

See BOND, II. 6, 12.—DISTRICT COURT, 8.—ESCAPE, 22.—INDEMNITY BOND, 3, 9.—LIMITS, II. 10. NEW TRIAL, I. 14.

On bond to the limits—Pleadings—Arrest of judgment.]—1. In an action by a sheriff on a bond to the limits, if the defendants plead that the debtor left the limits but afterwards returned to them and always remained on them after his return, the sheriff may take issue on the subsequent remaining, and he need not new-assign; but he cannot do so if the defendants by their plea do not admit the bond to have been broken before the debtor's return, as the plea would then amount to the general issue. And where the

plaintiff declared that the debtor left the limits in February, and the defendants pleaded that the plaintiff as sheriff, removed him in November, and that the debtor returned and always afterwards remained thereon; and the plaintiff replied that he did not always afterwards remain, on which issue was joined, and the plaintiff obtained a verdict—the Court refused to arrest the judgment, the verdict, according to the time stated, being consistent with the plaintiff's right, and the issue having been in fact on the subsequent remaining only. *Cameron v. McLeod et al.*, Trin. Term, 4 Vic.

On Indemnity bond—Verdict for sheriff against evidence.—2. Where an indemnity bond was given to the sheriff by an execution creditor for the sale of the debtor's goods, and the creditor afterwards directed the sheriff not to sell, but notwithstanding he went on and sold: *Held*, on an action by the sheriff on the bond of indemnity for damages recovered against him in consequence of the sale, that the defendant was entitled to a verdict on an issue that the sheriff was damnified of his own wrong; and the jury having found for the sheriff, the court granted a new trial. *McMahon v. Ingersoll*, Hil. Term, 5 Nic.

Verdict against sheriff for an escape—Recovery from debtor.—3. Where a sheriff suffers a voluntary escape, he cannot afterwards bring an action against the debtor to recover from him the amount which he has had to pay for his escape; but where in such an action the justice of the case was clearly with the sheriff, and the judge charged the jury in favor of the defendant, but they found a verdict for the plaintiff, the Court refused to grant a new trial. *Ruttan v. Ashford*, Hil. Term, 5 Vic.

Submission to arbitration by sheriff no bar to his action against the debtor.—4. They also held that a submission by the sheriff to arbitration in an action

against him for an escape could not bar his right afterwards to recover from the debtor, and that it was not necessary for that purpose that he should have allowed the action against him for the escape to have proceeded to verdict and judgment. *Ib.*

Case for fraudulent representation of an execution creditor.—5. A sheriff cannot maintain an action on the case as for a fraudulent representation, when having seized goods on an execution of a third party he is afterwards instructed by the defendant to seize the same goods on his execution, although on an adverse claim being set up, the plaintiff on the first writ withdrew his execution, and the defendant refuses either to withdraw his, or to indemnify the sheriff, and the adverse claimant afterwards prosecutes the sheriff and recovers for the illegal seizure and detention. *Commercial Bank v. Jarvis*, Easter Term, 5 Vic.

Action against his deputy for an escape—Assignment of breach.—6. Where in an action on a bond by a sheriff against his deputy the breach assigned within the terms of the condition was, that the order of a judge was delivered to the deputy for the committal to close custody of a debtor who had been admitted to the limits, and that the deputy had arrested him, but suffered him to escape; the breach was held bad, because it was not alleged either that the debtor was on the limits at the time the order was delivered to the deputy, or that he was arrested on the limits by the deputy under the order. *Ib.*

Case against his bailiff for an escape—Damages.—7. An action on the case lies in favor of a sheriff against a bailiff for negligence in allowing a prisoner to escape, in consequence of which the sheriff is sued by the creditor, and a verdict recovered against him for nominal damages: *and sem- ble*, that in such an action the sheriff

is allowed to recover both the costs of the action against himself and his own costs, although no notice of that action had been given to the bailiff by the sheriff, the plaintiff not being concluded by the former verdict, if he had no opportunity of defending in the sheriff's name. *Ruttan v. Shea*, v. U. C. R. 210.

Action against bail to the limits—Costs of original action.]—8. Where one of the bail of a debtor admitted to the limits, hearing of the debtor's escape, paid to the sheriff the amount of the debt and costs for which he was imprisoned, exclusive of the sheriff's own fees, and the sheriff nevertheless sued the other of the obligors in the limit bond, in order to recover from him the amount of costs in an action which the plaintiff in the original action had brought against the sheriff: *Held*, that after the receipt by the sheriff of the money paid by the other of the bail he could not recover for those costs, since he ought to have paid over the money, and not defended the action nor allowed it to proceed. *Gibbett v. Lake*, v. U. C. R. 454.

V. ACTIONS AGAINST, AND LIABILITY OF, SURETIES.

See ABATEMENT, 7.—ATTORNEY, IV. 8.—VARIANCE, 6.—WITNESS, 15.

Sureties bound by sheriff's return.]—1. The sureties of a sheriff are concluded by the sheriff's return to a writ of fi. fa. of money made, and cannot be allowed to get rid of their liability by shewing that there was a prior execution in the sheriff's hands which ought to have been first satisfied, and was not. *Shuter et al. v. Graham et al.*, ii. U. C. R. 164.

2. Nor can they be relieved after such return, by shewing that the money was not in fact made, even although an issue be raised upon the pleadings, whether the money was actually made

or not. *Phelp v. McDonell*, Hil. Term, 5 Vic.

Covenant against sheriff and sureties for not paying over monies—Declaration.]—3. In covenant against a sheriff and his sureties for default in the sheriff in not paying over monies levied under a writ of fieri facias against lands, the judgment on which the fieri facias issued must be set out in the declaration, but it is not necessary to recite a previous writ of fieri facias against goods. *Bidwell v. McLean et al.*, Mich. Term, 2 Vic.

Action—Personal representatives of sheriff cannot be joined with sureties.]—4. After a sheriff's death his personal representatives cannot be joined with his sureties, in an action on the covenant given by the sureties and the sheriff, under 3 Wm. IV. ch. 8, for a default by the sheriff in his life-time. *Boulton v. Hamilton*, Hil. Term, 3 Vic.

[Also further, case 15, infra.]

Action by execution debtor for a false return by sheriff—Declaration.]—5. Where, in an action against a sheriff's surety, the plaintiff set out a judgment and execution against himself in a former suit, and that the sheriff had levied the debt but falsely returned nulla bona to the writ, by means of which return the plaintiff was obliged to pay the debt again: *Held*, on general demurrer, that the declaration was bad, in not shewing how the plaintiff was compelled to pay the second time the levy on the execution, having discharged him from the debt. *Davis (H.) v. Hamilton*, Hil. Term, 4 Vic.

Covenant against sureties—General averments.]—6. In covenant against a sheriff's surety, it is a sufficient breach to allege that money was received by the sheriff, "as sheriff," without stating "by virtue of his office," but if the plaintiff omit to aver that the receipt of the money by the sheriff was after the execution of the covenant by the surety, the declaration will be bad

on general demurrer. *Davis (D.) v. Hamilton*, Hil. Term, 4 Vic.

[See an assignment of this breach—case 18, *infra*.]

Covenant for false return by sheriff—Pleadings.—7. Where in an action against a sheriff's surety for a false return of nulla bona by the sheriff, the plaintiff averred as a breach that the sheriff had levied and made the money, and the defendant pleaded that he had levied and made 282*l.*, a part thereof, and no more, which part he paid over: *Held*, on special demurrer, a sufficient answer to the plaintiff's declaration, and that the defendant was not obliged to state that there were no more goods or chattels whereby the sheriff could make the residue. *Watson et al. v. Hamilton*, Hil. Term, 4 Vic.

Covenant by execution debtor for misconduct of sheriff—Declaration.—8. In an action by a defendant in a writ of execution against the sureties of a sheriff on their covenant under the statute, for misconduct in the sheriff in the execution of the writ, it is not necessary that he should set forth in the declaration the judgment in the suit against himself, and it is a good breach of the covenant to shew that the sheriff sold the defendant's property for more than sufficient to satisfy the debt, and afterwards wrongfully sold it at a reduced price, causing a loss to the defendant of the difference. *Sanderson v. Hamilton*, i. U. C. R. 460.

Profert of covenant not necessary.—9. In an action against the sureties of a sheriff on their covenant it is not necessary in the declaration to make any profert of the covenant. *M'Crae v. Hamilton*, Trin. Term, 4 & 5 Vic.

Staying proceedings when security has paid the full amount of his liability.—10. The Court will not stay proceedings in an action against a sheriff's surety, who had suffered judgment to go by default, on the ground that he has already paid the full amount

of his liability, unless such payment were after plea pleaded; and the costs of actions brought against the surety, cannot be included in making up the amount for which he is liable under his covenant. *Hixon v. Hamilton*, Trin. Term, 4 & 5 Vic.

11. The Court refused to relieve a sheriff's surety who had suffered judgment to go by default after damages had been assessed against him, by allowing him to plead that he had already paid the amount of his covenant under the statute. *Scott v. McDonald et al.*, Mich. Term, 5 Vic.

Action for money received by sheriff—Declaration—Breaches.—12. In an action on a sheriff's covenant, it is a good breach to state that he was indebted in a named sum for money had and received, without specifying how, or on what account the money was received. *Commercial Bank v. Jarvis et al.*, Mich. Term, 6 Vic.

Action for false return by sheriff—Plea of payment before action.—13. It is no plea to a breach of a sheriff's covenant shewing a false return of nulla bona to a writ of execution after levying the money, that the sheriff paid the amount indorsed to the plaintiff before the action against him, on the covenant, was brought. *Ib.*

Covenant against sureties—Pleadings, negative pregnant, certainty.—14. In covenant against a sheriff's sureties, the breaches assigned were, first, that the sheriff did not arrest the debtor in the original action on a ca. re. delivered to him, but falsely returned non est inventus; and secondly, that he arrested him and afterwards allowed him to escape. The defendants pleaded to the first breach, that the sheriff did not falsely and deceitfully return that the debtor was not found in his district, and to the second, that the gaol was accidentally destroyed by fire, and so the debtor escaped. Both pleas were bad; the first, as containing a negative pregnant, and

the second, for not denying that the fire occurred through the negligence or default of the sheriff, or his deputy. *Corkery v. Graham et al.*, i. U. C. R. 315.

Staying proceedings till recovery made against personal representatives of sheriff.—15. After the decease of a sheriff, the Court will not stay proceedings in an action against his sureties on their covenant for a default committed by the sheriff in his lifetime until a recovery shall be had against the sheriff's representatives, nor will they direct in such a case that the execution on the judgment against the sureties be indorsed to levy first of the property of the sheriff. *Morris et al. v. Graham et al.*, i. U. C. R. 521.

Not liable for mere error of judgment in sheriff.—16. The sureties of a sheriff are not liable under their covenant, given in accordance with the terms of 3 Wm. IV. ch. 8, as for wilful misconduct on the part of the sheriff, where the misconduct consists in a mere error in judgment in deciding bona fide upon the priority of writs of execution placed in his hands. *Bradbury v. Adams et al.*, i. U. C. R. 538.

False return by deputy after the death of sheriff—Remedy of injured party.—17. *Semble*: Where a sheriff dies, and after his death his deputy returns a writ which is false, the remedy for the party injured by the false return is against the sureties given by the deputy to the sheriff, and not against the sureties given by the sheriff himself. *McLeod v. Boulton*, ii. U. C. R. 44.

Assignment of breach of the covenant for payment of monies by sheriff.—18. It is a sufficient breach of the covenant that the sheriff would pay over the monies received by him "that he had by virtue of his office received certain monies which the plaintiffs are entitled to according to the true intent and meaning of the

covenant, to wit, 50*l.* within the four years mentioned by the covenant, but that he neglected and refused to pay them to the plaintiffs, although often requested so to do." *Shuter et al. v. Graham et al.*, ii. U. C. R. 164.

Necessary evidence, to render sureties liable.—19. In an action against a sheriff's sureties, it must be shewn that the default or negligence for which the action is brought took place during the term for which they were liable under their covenant. *McMartin v. Graham et al.*, ii. U. C. R. 365.

Execution debt assumed by sheriff—Non-payment—Liability of sureties.—20. *Semble*: That if a sheriff having an execution against a person to whom he is indebted agree with that person to assume the amount of the execution and pay it to the plaintiff, and receives from the debtor a credit for so much on the debt due from himself, but does not pay over the money to the plaintiff in the writ, that this is such conduct as the sureties will be answerable for under the covenant. *Ib.*

VI. FEES.

See POUNDAGE AND SHERIFFS' FEES.

SHERIFF'S DEED.

See ALIEN, 6,—SCIRE FACIAS, 2.

Deed of land sold for taxes to purchaser's assignee.—1. The deed of land sold for taxes may be made by the sheriff to the assignee of the highest bidder. *Doe dem. Bell v. Orr*, Hil. Term, 7 Wm. IV.

Sheriff's deed not a mere release.—2. The deed given by the sheriff after a sale of lands under a fi. fa., whereby he conveys all the estate and interest of the debtor, is not to be considered as a mere "release" in the strict sense of the term. *Doe dem. Dissett v. McLeod*, iii. U. C. R. 297.

Deed, prima facie evidence of writ and sale.]—3. The sheriff's deed is prima facie evidence that the writ was delivered to the sheriff and the lands seized and sold under it, in an action of ejectment by a purchaser of lands sold under an execution. *Doe dem. Spafford v. Brown et al.* iii. O. S. 90.

Sale and deed by deputy after the death of the sheriff.]—4. A deed executed by a deputy sheriff, of lands sold under an execution after the death of the sheriff to whom the writ was directed, must be in the name of the deceased sheriff and not of the deputy; and if a sale be made by the deputy after he has received notice of the appointment of a new sheriff, it will be invalid and the deed void, as the writ should then be executed by the new sheriff. *Doe dem. Campbell v. Hamilton*, Easter Term, 3 Vic.

Registry.]—5. The provisions of the Registry Act are as much applicable to sheriffs' deeds given to purchasers at sheriffs' sales as to any other description of conveyances. *Doe dem. Brennan v. O'Neill*, iv. U. C. R. 8.

Conveys land actually sold and no more, though more be contained—Ambiguous description.]—6. A sheriff's deed being but a completion of the sale, is good for land actually sold; a party therefore is not estopped by a sheriff's deed from proving by parol that portions of the land therein described as sold were not in fact included in the sale; and if the description of the whole land in the deed be so blended together that one cannot distinguish between what was sold and what was not, the deed will be bad. *Doe dem. Miller v. Tiffany*, v. U. C. R. 79.

7. *Quare*: As to the right of a purchaser at sheriff's sale to set up the deed in the first place as *valid*, quoad the lessor and lessee, and then in the second place to repudiate the deed as *invalid*, quoad the execution creditor? *Doe dem. McPherson v. Hunter*, iv. U. C. R. 449.

SHERIFF'S SALE.

See ABSCONDING DEBTOR, 13. — ALIEN, 5.—DOWER I. 3.—EJECTMENT, VIII. 2, 14.—EXECUTION, 19.—FRAUDS (STATUTE OF), I. 1; III. 1.—MORTGAGE, 1, 13.—NEW TRIAL, II. 22.—SCIRE FACIAS, 2. SHERIFF, I. 5, 6 11.—TAXES, pas.

Public sale of lands or goods required.]—1. The statutes 43 Geo. III. ch. 1, and 2 Geo. IV. ch. 1, sec. 20, clearly contemplate a public sale in regard to lands, and that has always been the course both with respect to lands and goods (per Robinson, C. J.) *Doe dem. Miller v. Tiffany*, v. U. C. R. 88.

Under spent fi. fa.]—2. A sale of lands under a spent fi. fa. is void. *Doe dem. Greenshields v. Garrow v. U. C. R. 237.*

Debtor's acquiescence in sale, a waiver of certain irregularities.]—3. A party against whose lands a writ of fi. fa. was issued, under which the lands were seized and sold, cannot contest the validity of the sale on the ground of long delay in selling after the seizure, where it appears that the sale took place at his own instance or with his assent, and that he had received the benefit of the proceeds of such sale; neither can his heir after his death take an exception to the proceedings. *Doe dem. Harley v. McManus*, i. U. C. R. 141.

Omission of notice of an adjourned sale, how made good.]—4. Any want of regularity in giving public notice of an adjourned sale under a fi. fa. will not invalidate the sale where the debtor attended the sale by his agent and afterwards ratified what had been done. *Doe dem. Dissett v. McLeod*, iii. U. C. R. 297.

Invalid sale.—Liability of sheriff to refund purchase money.]—5. The court refused to order a sheriff to refund money received by him as the price of land sold at sheriff's sale, the

purchaser having been ejected upon the ground that lands could not be sold under a fi. fa. as assets in the hands of an administrator. *Carfrae In re*, Tay. U. C. R. 651.

Abandonment of seizure—Subsequent seizure and sale.—6. Where personal property had been seized in execution by a sheriff and afterwards abandoned by the direction of the plaintiff's attorney, and a memorandum of the suit being discharged given to the defendant, but the sheriff was afterwards directed to proceed, and sold to the plaintiff in this action (the property in the meantime having been sold bona fide by the defendant who had left it in the possession of the defendant in this action): *Held*, that no property passed to the plaintiff by the sheriff's sale, as the levy had been abandoned and a bona fide sale afterwards made by the defendant against whom the sheriff had the execution. *Gould v. White*, iv. O. S. 124.

Interference of court to prevent the giving of the deed—7. The Court will, after a sale of lands under an execution, prevent an assignment by the sheriff to the purchaser, where good cause is shewn for requiring their interference. *Bank of Upper Canada v. Miller*, Hil. Term, 3 Vic.

Notice of motion to set aside sale, to whom to be given.—8. Where an application was made to set aside a sale of land by a sheriff and delay the execution of a conveyance to his vendee, and notice of the motion and rule had been given to the sheriff and plaintiff's attorney, but not to the vendee: the Court refused to interfere. *McGillis v. McDonald*, Easter Term, 3 Vic.

Whole lot sold, when part might have been sufficient.—9. The fact that the whole of a farm may have been sold by a sheriff for a debt, which one would have supposed might have been satisfied by the sale of one portion of

it, is no ground to invalidate the sale. *Doe dem. Hagerman v. Strong et al.*, iv. U. C. R. 510.

Sale under a valid writ, but erroneous judgment—Land not recoverable.—10. After land has been sold upon a writ valid upon the face of it, though the judgment upon which the writ issued may be reversed for error appearing upon the record, yet the defendant in the execution can only be restored to the money, not the land. *Ib.*

Sale under a district court writ, for an amount beyond its jurisdiction.—11. It is no objection to a sale under a fi. fa. from a district court that the writ directs a sum beyond the jurisdiction of the court to be levied, which is stated in the writ to have been recovered for damages and costs. *Ib.*

12. *Quære*: Would the writ and sale be void if it had been stated in the writ that a sum exceeding the jurisdiction of the court had been recovered for damages only? *Ib.*

Sale by ex-sheriff—Incipient step while in office.—13. *Semble*: That to support a sale by an ex-sheriff out of office, it must appear that while in office he acted upon the writ to an extent amounting in law and fact to an incipient step in the execution of it, and duly followed up such step after leaving the office. *Doe dem. Miller v. Tiffany*, v. U. C. R. 79.

What acts, an inception of execution.—14. *Semble also*: That the mere receipt of a writ by a sheriff while in office, will not of itself be an incipient step in the execution of it. *Ib.*

15. *Quære*: What step will be a sufficient commencement of the execution of a writ against lands? *Ib.*

16. Will an advertisement in the Gazette or otherwise, according to the statute 1 Geo. IV. ch. 1, sec. 20, be sufficient? *Ib.*

Inception of execution—Acquiescence of debtor in irregularities.—17. *Held*, (Draper, J., dissentiente), that

the facts mentioned in the statement of this case (as given in the report,) constituted such an inception of execution against lands by the sheriff, during the currency of the writ and while he was in office, that a deed made under such execution by the same sheriff, *after* the writ was current and *after* he had gone out of office, passed the legal estate to the purchaser: *Held also*, (Draper, J., dissentiente), that the conduct of the execution debtor (also given in the report), shewed an acquiescence on his part in the ex-sheriff's right to proceed with the sale of the lands as he did, under the writ. *Doe dem. Tiffany v. Miller*, v. U. C. R. 426.

Sale of lands by an ex-sheriff several years after the currency of writ.]—18. The sale of lands by a sheriff under a fi. fa. five years after the sheriff who sold had left his office, when there had been no seizure or advertisement of sale during the currency of the writ, no continuance of proceeding under it, and no assent of the parties to the delay, cannot be upheld. *Quære*: Would such a deed be valid even though the sheriff continued in office up to the time of sale? *Doe dem. Young v. Smith*, i. U. C. R. 195.

Sheriff not allowed to purchase at sale.]—19. A sheriff cannot in any manner become the purchaser of property sold under an execution. *Doe dem. Thompson v. McKenzie*, Mich. Term, 2 Vic.

SHERIFF'S VENDEE.

See TAXES, passim.—TITLE, passim.
TRESPASS, I. 1.

SHIPPING.

See NAVIGATION.

SHIP REGISTRY ACT.

Reciting the certificate of registry of ownership in a mortgage.]—1. Under our provincial Ship Registry Act 8 Vic. ch. 5, secs. 13, 23, 24, the certificate of registry of ownership of a vessel is required to be recited in a transfer by way of mortgage or security, (with a power of sale in case of default), as well as upon an absolute or immediate sale; and where this is omitted, the mortgage will be wholly void. *Watkins et al. v. Corbett*, vi. U. C. R. 587.

Sufficiency of recital.]—2. *Held*, that the following recital of a certificate of registry of ownership of a vessel contained in an indenture of sale of such vessel—"The schooner James Coleman of Dundas, and duly registered according to the statute in such case made and provided, and the certificate of ownership of which is granted to the said William Colcleugh, whereby it is certified that the said vessel was registered at the custom house in the port of Hamilton the 8th day of April 1847, and is of the burthen of 232⁷⁰/₁₀₀, and which said certificate is under the hand of John Davidson the collector of and for the said port of Hamilton, as on reference to the said certificate will fully appear," was not a sufficient compliance with our Ship Registry Act 8 Vic. ch. 5, secs. 2, 7, 13, and that therefore the indenture of sale was void. The recital was held insufficient in giving the tonnage alone of the vessel which could not be said within the terms of the 13th section of the act to be such a description of the vessel as to shew the identity of the vessel transferred with that described in the certificate of registry. *Sherwood et al. v. Coleman*, vi. U. C. R. 614.

SHORE.

See CROWN GRANT, 9.

SIDE LINES.

See BOUNDARY LINE COMMISSIONERS, 4, 5.—FREDERICKSBURGH.—KINGSTON (TOWNSHIP OF).

Statute of Limitations.]—The Statute of Limitations applies to lands occupied by parties after having run side lines, although it appear on a new survey that the original side lines were run erroneously. *Dennison v. Chew*, Trin. Term, 6 & 7 Wm. IV.

SIMILITER.

See JUDGMENT AS IN CASE OF NON-SUIT, I. 7, 8, 9, 10, 11; III. 2, 3.

Compelling plaintiff to complete the issue.]—1. It is irregular to rule the plaintiff to enter the issue; the proper course is to demand a similiter, and if it be not given, to sign judgment of non pros. *Leahy v. Loucks*, ii. U. C. R. 178, Trin. Term, 9 Vic., P. C. Jones, J.

[See JUDGMENT OF NON PROS, 2.]

Not necessary to file,—Time to demur.]—2. The plaintiff replies de injuria to the defendants plea, concluding to the country, with an &c. The plaintiff makes up the nisi prius record, adding the similiter, &c. Ten days after the assizes had commenced, and a month after replication had been served, the defendant demurs to the replication: the plaintiff proceeds with the trial and has a verdict: the defendant moves to set it aside for irregularity, there being no similiter on the files of the court and the plaintiff paying no attention to the demurrer: *Held*, that under the rule of court, number 19, Easter Term, 5 Vic. there was no necessity to file a similiter: *Held also*, that under the 36th rule, Easter Term, 5 Vic., if the defendant wished to demur to the replication he might do so by serving within the proper time a

copy of the demurrer upon the plaintiff. *Duncombe v. Forger et al.*, iv. U. C. R. 192.

SLANDER.

See LIBEL AND SLANDER.

SMUGGLING.

See CUSTOMS' ACT.—REVENUE LAWS.

SODOMY.

See LIBEL AND SLANDER, II. 2.

SOLICITOR OF SHERIFF'S COURT, SCOTLAND.

See ATTORNEY, IV. 1.

SOLVIT AD DIEM.

See PAYMENT, 2.

SOLVIT POST DIEM.

See PAYMENT, 2.

SON ASSAULT DEMESNE.

See ASSAULT AND BATTERY, 1, 3.

SPECIAL JURY.

See COSTS, II. 12.—JURY, *passim*.

SPIRITUOUS LIQUORS.

See CONVICTION, I. 6.

24 Geo. II. ch. 46.]—1. A shopkeeper in this province may recover

for spirituous liquors sold in less quantities than to the value of twenty shillings at a time. *Leith v. Willis*, Easter Term, 6 Will. IV.

2. The British statute 24 Geo. II. ch. 46, disallowing the sale of spirituous liquors at one time of quantities of less value than twenty shillings to be consumed out of the shop, is not in force in this province. *Hartley v. Hearn*, Trin. Term, 5 & 6 Vic.

STAKEHOLDER.

See GAMING, 1.

STATUTE LABOR.

See DISTRICT COUNCIL, 17.

A party, to save himself from fine, must perform when called upon, his statute labor *within the division* of the township in which he resides. *Gates v. Devenish*, vi. U. C. R. 261.

STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF).

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

STATUTES (CONSTRUCTION OF).

See CUSTOMS ACTS.—FRAUDS (STATUTE OF).—INDEMNITY ACT.—INTERPLEADER.—LIMITATIONS (STATUTE OF).—PENAL STATUTE.—PETTY TRESPASS ACTS.—SHIP REGISTRY ACT.—TESTATUM ACT.

Public or private.—1. The statute vesting the property of a particular bank in the hands of commissioners, with power to hear and determine

claims made upon the bank by creditors, though stated in the preamble to be made "on behalf of a great portion of the inhabitants of the Province," was not considered by this court as a public statute. *Markland et al. v. Bartlet*, Tay. U. C. R. 185.

Forfeiture—Waiver and continuance by the legislature.—2. *Semble*, that when an act of the legislature has become forfeited by non-fulfilment of some of its conditions, the legislature may waive the forfeiture, and by special enactment continue the existence of the act. *The City of Toronto and Lake Huron Railroad Company v. Crookshank*, iv. U. C. R. 309.

Recital of the statute being passed at the prayer of parties interested.—3. *Semble also*, that when a statute amending an original statute recites that it has been granted upon the prayer of the parties interested in the original statute, it must be taken upon the recital as conclusive that each individual interested in the original statute was concurring in the passing of the amended statute. *Ib.*

Recital in pleading.—4. To recite certain statutes as statutes of the province of *Canada*, when they are statutes of the province of *Upper Canada*, is bad on general demurrer. *Huron District Council v. The London District Council*, iv. U. C. R. 302.

5. It is also bad on general demurrer to refer to any statute as having been passed in *two of the years* (as the 4th & 5th) of Her Majesty's reign. *Ib.*

[Upholding *Gibbs v. Pike*, viii. M. & W. 223. It may, however, be recited as a statute passed in a *session* holden in both years. *Ib.*

In pleading, the whole of the title must be stated, though it comprise several other subject matters besides that to which the pleading properly relates. *Beck v. Beverley*, xi. M. & W. 845.]

Mis-recital of private act—Demurrer.—6. *Semble*, that the mis-recital of the title of a private act of parliament is no ground of demurrer. *Ferrie v. Jones et al.*, v. U. C. R. 504.

- 23 Geo. III. ch. 8—LETTERS OF ADMINISTRATION—*King v. Clarts*, Hil. Term, 2 Vic.
PLEADING, II. 6.—*Bagot v. McKenzie*, Mich. Term, 7 Vic.
- 35 Geo. III. ch. 5, sec. 2—DEED, III. 1, 2, 3, 6, 7, 13, 16, 17, 18.
_____sec. 5—DEED, III. 11, 12—*Doe dem. Russell v. Gillett*, Mich. Term, 3
Vic., and *Doe dem. McLean v. Manahan*, i. U. C. R. 491.
_____sec. 10—DEED, III. 10—*Hamilton v. Lyons*, Easter Term, 7 Wm. IV.
_____sec. 15—INFANT, 5—*McLeod v. Truax*, Hil. Term, 7 Wm. IV. WILL,
2—*Doe dem. Eberts et ux. v. Wilson*, iv. U. C. R. 386.
- 36 Geo. III. ch. 2—JURY, 10—*Fraser v. Dickson*, v. U. C. R. 231.
- 40 Geo. III. ch. 4—CONVICTION, 1, 6—*Rex v. Ferguson*, iii. O. S. 220, and *Wilson v. Graybiel et al.*, v. U. C. R. 227.
- 43 Geo. III. ch. 1—SHERIFF'S SALE, 1—*Doe dem. Wilson v. Tiffany*, v. U. C. R. 88. VEN-
DITIONI EXPONAS, 1, 2, 3.
_____ch. 5—DEED, II. 4, 5, 6, 7, 8, 9, 10.
- 45 Geo. 3, ch. 7—INSOLVENT AND INSOLVENCY, passim.
- 47 Geo. III. ch. 11—CLERK OF THE PEACE, 1, 2—*Askin v. London District Council*, i. U.
C. R. 292.
- 49 Geo. III. ch. 4, sec. 1—COSTS, IV(1). *All cases under the title and division.*
_____sec. 2—COSTS, IV(2). *Ib.*
_____ch. 126, (Imp. Stat.)—BOND, I. 11—*Fbott v. Bullock*, iv. U. C. R. 480.
- 50 Geo. III. ch. 1—HIGHWAY, 2—*Rex v. Sanderson*, iii. O. S. 103.
_____STREET SURVEYOR—*McFarlane v. McDougall*, ii. O. S. 73.
_____ch. 6—BILLIARD TABLES, 2, 3, 4—*Church qui tam. v. Richards*, vi. U. C.
R. 562.
- 51 Geo. III. ch. 9, sec. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, VIII. 2, 3, 6.
_____sec. 6—USURY, passim.
- 54 Geo. III. ch. 9, sec. 2—INQUISITION—*Rex v. Phelps*, Tay. U. C. R. 54.
- 55 Geo. III. ch. 2, sec. 1—EXIGENT—*Rex v. Elrod*, Tay. U. C. R. 152.
- 56 Geo. III. ch. 16—DEED, III. 16—*Doe dem. Matlock v. Distier*, iv. U. C. R. 14.
- 58 Geo. III. ch. 1, sec. 1—COSTS, I.—*All the cases.*
_____sec. 2—COSTS, VIII. 1—*McCall et al. v. Cameron*, i. U. C. R. 414.
_____ch. 5, sec. 3—FALSE IMPRISONMENT, 6—*Oviatt v. Bell*, i. U. C. R. 18.
_____ch. 93, (Imp. Stat.)—USURY—*Geddes v. Culver et al.*, iii. U. C. R. 162.
- 59 Geo. III. ch. 3, secs. 1, 2, 3 and 4—DEED, II. 4, 5, 6, 7, 8, 9 and 10. EJECTMENT, I. 13—
Doe dem. Vansickler v. Fairwell, Mich. Term, 4 Vic.
_____ch. 7—TAXES, passim.
_____ch. 14—BOUNDARY LINE COMMISSIONERS, 4, 5, 6, KINGSTON (TOWNSHIP
OF)—*Doe dem. Stuart v. Forsyth*, i. U. C. R. 324. LIMITATIONS (STA-
TUTE OF). II. 2, 25—*Doe dem. Stuart v. Radich*, Tay. U. C. R. 679,
and *Doe dem. Morgan v. Simpson*, Trin. Term, 1 & 2 Vic. SURVEY,
passim.
- 2 Geo. IV. ch. 1, sec. 8—ARREST, I. passim; IV. 1.
_____sec. 9—CONSTABLE, 3, 4, 5, 6.
_____sec. 10—ARREST, I. 4, 5, 16, 21, 23, 39; III. 11; IV. 4. DISTRICT
COURT, 1.
_____sec. 11—BAIL, III. 8—*Billings et al. v. Berry*, Easter Term, 2 Vic.
_____sec. 12—BAIL, I. 4, 5, 6, 7, 8.
_____sec. 13—BAIL, I. 1, 2, 3; III. 6.
_____sec. 15—ARREST, I.; II. 13.—CAPIAS AD SATISFACIENDUM, passim.
_____secs. 17 and 18—COMMISSION TO EXAMINE WITNESSES.—*All the cases.*
_____sec. 20—SHERIFF'S SALE, 1—*Doe dem. Miller v. Tiffany*, v. U. C. R. 88.
_____sec. 40—BAIL, II. 8—*Gillespie et al. v. Grant*, iii. U. C. R. 400.
_____ch. 8—INSOLVENT AND INSOLVENCY, passim.
_____ch. 13—ACCOUNT STATED, 1—*Crooks et al. v. Law*, Trin. Term, 7 Wm. IV.
CURRENCY.—*Phinny v. Stevenson*, i. U. C. R. 428.
_____ch. 14—DEED, II. passim.
- 4 Geo. IV. ch. 11—CUSTOMS ACTS, passim.
_____ch. 17—WELLAND CANAL, 1—*Rex v. The Welland Canal Company*, Tay. U.
C. R. 440.
_____ch. 19—CONVICTION, 1, 6—*Rex v. Ferguson*, iii. O. S. 220, and *Wilson v.*
Graybiel, v. U. C. R. 227.
- 6 Geo. IV. ch. 2—WELLAND CANAL, 2—*Welland Canal Company v. Warren et al.*, Hil.
Term, 1 Wm. IV.
_____ch. 7—TAXES, passim.
_____ch. 16, sec. 108, (Imp. Stat.)—BANKRUPT AND BANKRUPTCY, 6—*Maulson v.*
The Commercial Bank, ii. U. C. R. 338.

- 6 Geo. IV. ch. 114, (Imp. Stat.)—ARREST OF JUDGMENT, 3—*Jones qui tam v. Chace*, Dra. Rep. 334. DEBT, 1, *ib.*
- 7 Geo. IV. ch. 16—FREDERICKSBURGH—*Doe dem. Clapp v. Huffman*, Mich. Term, 5 Vic.
- 8 Geo. IV. ch. 1, (Priv. Act.)—RIDEAU CANAL, *passim*.
 —————ch. 8—INSOLVENT AND INSOLVENCY, *passim*.
- 9 Geo. IV. ch. 21—ALLEN, *passim*.
- 10 Geo. IV. ch. 7, (Priv. Act.)—ARBITRATION AND AWARD, VI(2), 7—*Kington Bank Commissioners v. Dalton*, Easter Term, 3 Vic.
- 11 Geo. IV. ch. 3—LIMITS, *passim*.
 —————ch. 11, (Priv. Act.)—COBBOURG HARBOUR COMPANY.
- 1 Wm. IV. ch. 1—AMENDMENT, II. *passim*.
 —————ch. 8—BINBROOK (TOWNSHIP OF)—*Doe dem. Crooks v. TenEyck*, vii. U. C. R. 581.
 —————ch. 12—NIAGARA HARBOR AND DOCK COMPANY—*Hamilton v. The Niagara Harbor and Dock Company*, Easter Term, 5 Vic.
 —————ch. 26—TITLE, 5—*Doe dem. Baldwin v. Stone*, v. U. C. R. 388.
- 2 Wm. IV. ch. 4, sec. 1—CONVICTION, 1, 5, 6, 8, 9.
 —————ch. 5—ABSCONDING DEBTOR, *passim*.
 —————ch. 15—PORT BURWELL HARBOR COMPANY—*Jenkins v. Port Burwell Harbor Company*, Mich. Term, 3 & 4 Vic.
 —————ch. 35—PARTITION.—*All the cases*.
- 3 Wm. IV. ch. 7, sec. 1—CANADA COMPANY—*Cooper v. The Canada Company*, Easter Term, 1 Wm. IV.
 —————ch. 8—SHERIFF, V. *passim*.
 —————ch. 17, (Priv. Act.)—ST. LAWRENCE CANAL—*Tait v. Langley et al.*, Easter Term, 3 Vic.
- 3 & 4 Wm. IV. ch. 59, sec. 72, (Imp. Stat.)—CUSTOMS ACTS, 1—*Lewis v. Kirby*, i. U. C. R. 426
- 4 Wm. IV. ch. 1, sec. 16—LIMITATIONS (STATUTE OF), II. *passim*.
 —————sec. 17—DOWER, II. 4, 5—*German v. Grooms*, vi. U. C. R. 414, and *McClellan et ux. v. Meggatt et al.* vii. U. C. R. 21. LIMITATIONS (STATUTE OF), II. 1—*Doe dem. McKay v. Purdy et al.*, Easter Term, 4 Vic.
 —————sec. 20 DISTRESS, I. 3—*McClenaghan v. Baker*, i. U. C. R. 26.
 —————sec. 47—DREED, III. 7, 8, 14.
 —————sec. 48—ESTATE, II. 1—*Doe dem. Berringer v. Hiscott*, Mich. Term, 3 Vic. JOINT TENANCY, 1—*Doe dem. Skuter et al. v. Carter*, Hil. Term, 2 Vic.
 —————sec. 52—LIMITATIONS (STATUTE OF), II. 4—*Doe dem. Lyons v. Crawford*, Easter Term, 5 Vic. TITLE, 17—*Doe dem. Baldwin v. Stone*.
 —————sec. 53—COSTS, VII. 6—*McLachlan, In re*, iii. U. C. R. 331.
 —————LANDLORD AND TENANT, II. 2 et seq.
- 4 Wm. IV. ch. 3—INSOLVENT AND INSOLVENCY, *passim*.
 —————ch. 4, sec. 12—ASSAULT ETC., 5, 6—*Heney v. Simpson*, Trin. Term, 1 & 2 Vic., and *DeLong v. McDonell*, Easter Term, 2 Vic. PETTY TRESPASS ACTS—*DeLong v. McDonell*, Easter Term, 2 Vic.
 —————sec. 21—COSTS, VII. 7—*Armour v. Boswell et al.*, Trin. Term, 5 & 6 Vic.
 —————ch. 5—BAIL, I. 3—*McKenzie v. Macnab*, Easter Term, 2 Vic.
 —————ch. 7—DISTRICT COURT, 3, 4—*Wheeler v. Sime et al.*, iii. U. C. R. 265, and *Foster v. Miller*, v. U. C. R. 509. REPLEVIN ETC., *passim*.
 —————ch. 10—LIMITS, *passim*.
 —————ch. 12—FENCES, 1—*Lane v. Mulholland et al.*, Easter Term, 6 Wm. IV.
 —————ch. 18—CONVICTION, 1, 6—*Rex v. Ferguson*, iii. O. S. 320, and *Wilson v. Grabel et al.*, v. U. C. R. 227.
 —————ch. 23—TORONTO (CITY OF), 1—*Harvey v. French*, Easter Term, 3 Vic.
 —————ch. 32, sec. 5—PORT CREDIT HARBOR COMPANY—*Port Credit Harbor Company v. Jones et al.*, v. U. C. R. 144.
- 4 & 5 Wm. IV. ch. 89, sec. 25, (Imp. Stat.)—CUSTOMS ACTS, 3—*McKenzie et al. v. Kirby*, Trin. Term, 5 & 6 Vic.
- 5 Wm. IV. ch. 1, (generally.)—BILLS OF EXCHANGE ETC., VIII. 7—*Sifton v. McCabe et al.*, vi. U. C. R. 394.
 —————sec. 1—COSTS, I(1), 16; VI.
 —————sec. 2—BILLS OF EXCHANGE ETC., V. 16—*Small v. Rogers et al.*, Mich. Term, 6 Vic.
 —————BILLS OF EXCHANGE ETC., V. 36—*Malloch v. Norton*, Mich. Term, 2 Vic.

- 5 Wm. IV. ch. 1, sec. 2—SET OFF, 14—*Paterson v. Howison et al.*, ii. U. C. R. 139.
 _____ COSTS, VI. *passim*.
 _____ WITNESS, 13, 14—*Bradbury v. Toney et al.*, Mich. Term, 5 Vic.,
 _____ and *McLaren v. Muirhead et al.*, iii. U. C. R. 59
 _____ sec. 13—ABATEMENT, 2—*Richmond et al. v. Campbell*, Mich. Term, 2 Vic..
 5 Wm. IV. ch. 3, sec. 2—EJECTMENT, IV(2), 4, 5—*Regina v. Kelly*, Trin. Term, 4 & 5
 _____ Vic. P. C., and *Watson v. Dillingham*, Easter Term, 7 Vic.
 _____ secs. 2, 3 & 4—INSOLVENT AND INSOLVENCY, *passim*.
 _____ ch. 5—ABSCONDING DEBTOR, *passim*.
 5 & 6 Wm. IV. ch. 62, (Imp. Stat.)—DEED, III. 9—*Lyons In re*, Hil. Term, 7 Vic.
 6 Wm. IV. ch. 4, sec. 2—MANDAMUS, 18—*Regina v. McConnel*, Hil. Term, 7 Vic.
 _____ sec. 18—INSURANCE, *passim*.
 7 Wm. IV. ch. 3, sec. 6—ABATEMENT, 1, 3, 5.
 _____ sec. 8—JUDGMENT OF NON PROS, 3—*Hart et al. v. Boyce*, Mich. Term,
 _____ 5 Vic. VARIANCE, 9—*Ketchum v. Jones et al.*, v. U. C. R. 460.
 _____ sec. 9—BILLS OF EXCHANGE ETC., V. 30, 31, 32.
 _____ sec. 15—AMENDMENT, II. *passim*.
 _____ secs. 18 & 19—WITNESS, 15—*Roy v. Hamilton*, Hil. Term, 5 Vic.
 _____ secs. 24 & 26—COSTS, V.—*All the cases*.
 _____ sec. 29—ARBITRATION AND AWARD, II. *passim*. MESNE PROFITS, 5—
 _____ *Green v. Hamilton*, Easter Term, 3 Vic.
 _____ ch. 5, sec. 1—BILLS OF EXCHANGE ETC., II. *passim*; III. 3.
 _____ sec. 3—USURY, 10—*Geddes v. Culvert et al.*, iii. U. C. R. 162.
 _____ ch. 8—SEDUCTION, *passim*.
 _____ ch. 10, sec. 2—JURY, 8—*Cole, In re*, Trin. Term, 5 & 6 Vic.
 _____ secs. 8 & 10—RECOGNIZANCE, *passim*.
 _____ ch. 13—JOINT STOCK COMPANY, 1—*Hall v. Buck*, Trin. Term, 2 & 3 Vic.
 _____ ch. 14, sec. 14—CORPORATION, *passim*.
 _____ ch. 15 ATTORNEY, IV. 1—*Macara In re*, ii. U. C. R. 114.
 _____ ch. 16—KING'S COLLEGE, 1. 2—*King's College v. Denison*, v. U. C. R. 203.
 _____ ch. 34—BANK OF BRITISH NORTH AMERICA, 2—*White v. Hunter*, Easter Term,
 _____ 4 Vic.
 _____ ch. 54—BINBROOK (TOWNSHIP OF)—*Doe dem. Crooks v. TenEyck*, vii. U.
 _____ C. R. 581.
 1 Vic. ch. 7, secs. 1 & 2—EXECUTOR AND ADMINISTRATOR, I. 11—*Gilmore v. Crooks et*
 _____ *al.*, Hil. Term, 7 Vic.
 _____ ch. 10—TREASON, 2—*Doe dem. Gillespie v. Wixon*, v. U. C. R. 132.
 _____ ch. 12—INDEMNITY ACT, 1, 2—*Hyatt v. Anger*, Easter Term, 2 Vic., and *Lockhart*
 _____ *v. Dixon*, Hil. Term, 3 Vic.
 _____ ch. 16—DISTRESS, II, 5, 7—*Stoddard v. Arderley*, Hil. Term, 5 Vic., and *Nichol v.*
 _____ *Mooney et al.*, i. U. C. R. 199.
 _____ ch. 17, sec. 2—MANDAMUS, 3, 14—*Rex v. The Magistrates of Niagara*, Tay. U. C.
 _____ R. 542, and *Cornwall v. Baby*, Hil. Term, 5 Vic.
 _____ ch. 19—BOUNDARY LINE COMMISSIONERS.—*All the cases*.
 _____ sec. 3—MANDAMUS, 16—*Boundary between Eastern and Johnstown Districts,*
 _____ *In re*, Mich. Term, 6 Vic.
 _____ ch. 21, sec. 18—RATE COLLECTOR—*Regina v. Ryan*, vi. U. C. R. 296.
 _____ sec. 27—ARREST, IV. 10—*Croukhite v. Somerville*, iii. U. C. R. 129.
 _____ ch. 30, (Priv. Act)—KINGSTON MARINE RAILWAY COMPANY, 1, 2, 3—*Kingston Ma-*
 _____ *rine Railway Company v. Gunn*, iii. U. C. R. 368.
 2 Vic. ch. 6, sec. 1—See 59 Geo. III. ch. 3, *supra*.
 _____ ch. 15, sec. 2—INDIAN LANDS, 1. 2—*Little et al. v. Keating*, Hil. Term, 5 Vic.
 3 Vic. ch. 8—BILLS OF EXCHANGE ETC., IV. 5—*Ramadell v. Telfer*, v. U. C. R. 508, and
 _____ *Nordheimer et al. v. O'Reilly et al.*, vi. U. C. R. 413. BILLS OF EXCHANGE
 _____ ETC., V. 11, 16. 21—*Bank of Upper Canada v. Gwynne et al.*, iv. U. C. R. 145,
 _____ and *Small v. Rogers et al.*, Mich. Term, 6 Vic., and *Grant v. Eyre et al.*, ii.
 _____ U. C. R. 426. PLEADING, II. 18.—*Ib*.
 _____ ch. 9, sec. 9—BILLIARD TABLES—*Church qui tam. v. Richards*, vi. U. C. R. 562.
 _____ ch. 11—BOUNDARY LINE COMMISSIONERS, *passim*.
 _____ ch. 20, sec. 10—BILLIARD TABLES—*Church qui tam. v. Richards*, vi. U. C. R. 562.
 _____ ch. 31, (Priv. Act)—LONDON (TOWN OF), 2—*The Board of Police of London v.*
 _____ *Talbot*, ii. U. C. R. 543.
 _____ ch. 53, sec. 17—MIDLAND DISTRICT TURNPIKE TRUST, 1, 2, 3.
 _____ sec. 27—WITNESS, 20—*Cummings v. Glassup et al.*, i. U. C. R. 364.
 _____ sec. 28—TOLLS, 1—*O'Hara v. Foley*, iii. U. C. R. 216.
 _____ sec. 34—TOLLS, 2—*Regina v. Brown*, iv. U. C. R. 147.

- 3 Vic. ch. 74—WILL, 11, 12, 13—*Doe dem. Baker v. Clark*, vii. U. C. R. 44.
- 4 Vic. ch. 26, sec. 20 & 27—ASSAULT AND BATTERY, 9—*Madden v. Farley*, vi. U. C. R. 210.
- 4 & 5 Vic. ch. 3—DIVISION COURT, *passim*. NOTICE OF ACTION, 1—*Kimble v. McGarry*, Mich. Term, 7 Vic.
- ch. 7, sec. 3—NATURALIZATION—*Doe dem. Chandler v. Tessier*, vi. U. C. R. 216.
- ch. 10—DISTRICT (NOW COUNTY) COUNCIL, *passim*.
- ch. 18—DIVISION COURT, 1—*McGregor v. White*, i. U. C. R. 25.
- ch. 25—LARCENY—*McDonald v. Cameron*, iv. U. C. R. 1.
- sec. 67—NOTICE OF ACTION, 8—*McDonald v. Cameron*, ii. U. C. R. 406.
- ch. 26—GENERAL ISSUE, 4—*Moore v. Holditch et al.*, vii. U. C. R. 207.
- MAGISTRATES, 6—*Powell v. Williamson*, i. U. C. R. 154.
- secs. 20 & 28—ASSAULT AND BATTERY, 9—*Madden v. Farley*, vi. U. C. R. 210.
- sec. 40—NOTICE OF ACTION, 14—*Dempsey v. Dougherty et al.*, vii. U. C. R. 313.
- ch. 27, sec. 313—APPEAL, 6—*Justices of the Brock District, In re*, Mich. Term, 6 Vic.
- ch. 89, sec. 23—FLOUR—*Regina v. Beekman*, ii. U. C. R. 57.
- ch. 100, sec. 18—CLERGY RESERVES—*Byres v. Moore*, v. U. C. R. 4, and *Doe dem. Weisenberger v. McGlennon*, v. U. C. R. 138.
- 5 & 6 Vic. ch. 26, (Imp. Stat.)—MARRIAGE—*Doe dem. Breakey v. Breukey*, ii. U. C. R. 349.
- 6 Vic. ch. 27—BANK OF UPPER CANADA.—*All the cases*.
- 7 Vic. ch. 4, sec. 2—BILLS OF EXCHANGE ETC., III. 18—*Smith et al. v. Hall*, iii. U. C. R. 313.
- ch. 10—BANKRUPT AND BANKRUPTCY, *passim*.
- ch. 11—ORDNANCE DEPARTMENT, 1, 2, 3—*Principal Officers of Her Majesty's Ordnance v. Johnson*, i. U. C. R. 198, *Tully et al. v. The Principal Officers of Her Majesty's Ordnance*, v. U. C. R. 6, and *Doe dem. Musgrove v. L'Esperance*, vii. U. C. R. 343.
- ch. 16, sec. 54—FOREIGN JUDGMENT, 12—*McPherson et al.*, v. *McMillan*, iii. U. C. R. 34.
- ch. 18, sec. 16—LOWER CANADA—*Doe dem. Parke et al. v. Henderson*, vii. U. C. R. 182.
- ch. 29—COMMON SCHOOLS, *passim*.
- ch. 30—INTERPLEADER, *passim*.
- ch. 31—ARREST, II. 11, 12; IV. 8. ATTACHMENT, III. 2—*Garrison v. Balkwell et al.*, i. U. C. R. 2. BAIL, III. 12—*Harday v. Hall et al.*, ii. U. C. R. 276. RECOGNIZANCE, 5—*McDonald v. Weeks et al.*, iii. U. C. R. 441.
- ch. 33—SHERIFF, II. *passim*.
- ch. 43, (Priv. Act.)—NATURALIZATION—*Doe dem. Chandler v. Tessier*, vi. U. C. R. 216.
- 8 Vic. ch. 5—SHIP REGISTRY ACT.—*All the cases*.
- ch. 13, sec. 5—DISTRICT (NOW COUNTY) COURT, 1, 6, 9, 12, 13.
- sec. 20—*Id.*, 10, 11—*Cockrane v. Eyre et al.*, vi. U. C. R. 389.
- sec. 21—*Id.*, 7, 8—*Hamilton v. Shears*, v. U. C. R. 309.
- sec. 23—See section 20, *supra*.
- sec. 44—DISTRICT (NOW COUNTY) COURT, 2—*Easton et al. v. Longchamp et al.*, iii. U. C. R. 475.
- sec. 50—See section 20, *supra*.
- sec. 51—WRITS OF TRIAL AND INQUIRY, 4, 5, 6, 7, 8.
- sec. 54—*Id.*, 1, 2, 3.
- sec. 55—*Id.*, 3, 4, 5. WAIVER, 2—*Small v. Beasley*, iii. U. C. R. 141.
- ch. 22—TAXES, 10—*Doe dem. The Earl of Montcashel v. Grover*, iv. U. C. R. 23.
- ch. 36—TESTATUM ACT, and cases there referred to.
- ch. 37—DIVISION COURT, 5—*Regina v. Patton*, *Regina v. McCulloch*, and *Regina v. Moran*, vii. U. C. R. 83.
- ch. 45—SUNDAY.—*All the cases*.
- ch. 48, secs. 1, 8 & 18—ATTORNEY, II(1), 2—*Alexander v. A. B. & C. D.*, v. U. C. R. 329.
- secs. 4, 5 & 24—INSOLVENT ETC., 24—*Ferrie et al. v. Lockhart*, iv. U. C. R. 477.
- ch. 62, sec. 17—MANDAMUS, 22—*Regina v. The Board of Police of Niagara*, iv. U. C. R. 141.
- ch. 72, secs. 3 & 4—*Id.*
- ch. 83—TORONTO AND LAKE HURON RAILROAD COMPANY—*Toronto and Lake Huron Railroad Company v. Crookshank*, iv. U. C. R. 303.

- 8 & 9 Vic. ch. 93, sec. 66, (Imp. Stat.)—CUSTOMS ACTS, 6—*Attorney General v. Warner*, vii. U. C. R. 399.
 —sec. 89, (Imp. Stat.)—WITNESS, 23—*Attorney General v. Warner*, v. U. C. R. 485.
 9 Vic. ch. 9, sec. 1—FERRY, 5—*Ives et al. v. Calvin*, iii. U. C. R. 464.
 —ch. 20—COMMON SCHOOLS, *passim*.
 —ch. 34, sec. 6—See 35 Geo. III. ch. 5, sec. 2, *supra*.
 —secs. 7 & 9—DEED, III. 15—*Registrar of the County of York, In re*, iii. U. C. R. 188.
 —sec. 16—DEED, III. 20 21—*Keele v. Ridout*, v. U. C. R. 240, and *Smith et al. v. Ridout*, v. U. C. R. 617.
 —sec. 21—See 35 Geo. III. ch. 5, sec. 10, *supra*.
 —ch. 37—ARBITRATION AND AWARD, I. 10; III(1). 6; IV(3), 6, 7; V. 9—*Commissioners of Public Works v. Daly et al.*, vi. U. C. R. 33.
 —ch. 40—DISTRICT COUNCIL, *passim*.
 —ch. 88, sec. 33—ALBION ROAD, *Regina v. Haystead*, vii. U. C. R. 9.
 —ch. 90, sec. 12—BUILDING SOCIETIES—*Doe dem. Barwick et al. v. Clement*, vii. U. C. R. 549.
 10 & 11 Vic. ch. 6—DISTRICT COUNCIL, 18—*Hawkeshaw v. The District Council of the District of Dalhousie*, vii. U. C. R. 90.
 —ch. 15, sec. 5—CLERK OF THE CROWN AND PLEAS, 1, 2—*Mills v. James*, v. U. C. R. 216, and *White v. Petch et al.*, vii. U. C. R. 1. INSOLVENT ETC., 26—*Gillespie et al. Nickerson*, vi. U. C. R. 628.
 —ch. 24—See 9 Vic. ch. 37, *supra*.
 —ch. 48—BILLIARD TABLES, 2—*Church qui tam. v. Richards*, vi. U. C. R. 662. LONDON (TOWN OF), 3—*Balkwell, In re*, v. U. C. R. 624.
 11 Vic. ch. 14—GAS COMPANIES, *passim*.
 12 Vic. ch. 22—BILLS OF EXCHANGE ETC., II. 12—*Ridout et al. v. Manning et al.*, vii. U. C. R. 35.
 —ch. 70—WITNESS, 25, 26—*Doe dem. McDonell v. Rattray*, vii. U. C. R. 321.

STAY OF PROCEEDINGS.

See ARBITRATION AND AWARD, VIII.

3.—ATTACHMENT, III. 3.—ATTORNEY, II(1), 6.—BAIL, I. 5, 7; II. 3, 12, 13.—COGNOVIT, 2, 3.—COSTS, VIII. 9.—DEMURRERS, 17. EJECTMENT, VI.—EXECUTION, 6. FALSE IMPRISONMENT, 4.—INDEMNITY ACT, 1.—MORTGAGE, 2, 6, 11.—PARTICULARS OF DEMAND, 1, 10.—PRACTICE, II. 10, 43.—PROHIBITION, 1.—REPLEVIN ETC., 7.—SCIRE FACIAS, 6.—SHERIFF, II. 2; V. 10, 11.—TITLE, 4.—USURY, 4.

When rule begins to operate.—1. *Semble*: That proceedings are stayed from the time of *making* the rule to stay proceedings, and not from the time of *service* of the rule. *Patterson v. Attrill et al.*, iv. U. C. R. 395.

Condition precedent to the operation of the rule.—2. A rule was made in term, that on payment of a certain sum and costs, further procee-

dings should be stayed on the verdict given in the cause at the assizes preceding such term; the rule was served on the plaintiff's attorney during the second Friday in Term, with an appointment to tax costs: *Held*, that the rule did not stay proceedings till the money was paid or tendered, and that the plaintiff was not irregular in entering his judgment on the following day, being the last day of Term. *Forster v. Hodgson*, vi. U. C. R. 16.

STEAMBOAT.

See ASSUMPSIT, I. 3.—NAVIGATION.

ST. LAWRENCE CANAL.

See MANDAMUS, 21.

Assumpsit against commissioners.—Assumpsit does not lie against the commissioners of the St. Lawrence canal, under 3 Wm. IV. ch. 17, for

work done on the canal on a contract made with them, unless it can be specially shewn that they made themselves personally liable, as they must be considered merely as the agents of the government. *Tait v. Langley et al.*, Easter Term, 3 Vic.

STOCK.

See ASSUMPSIT, I. 3.—INFANT, 2.—TORONTO AND LAKE HURON RAILROAD COMPANY.—WITNESS, 12.

STOCK BOOKS.

See CORPORATION, 1.

STOCK NOTES.

Consideration—Words “value received”—Common counts.—1. The words “value received” in an agreement to the following effect—“I promise to pay to A. or bearer 25*l*. value received, to be paid in merchantable wheat at market price,” import a debt due, and are prima facie evidence of a consideration; and such an agreement may be shewn under the counts for money had and received and the account stated. *Waddel v. McCabe*, iii. O. S. 502.

Words “value received”—Consideration—Public policy.—2. The words “value received” in a stock note import prima facie a consideration; and a consideration which cannot legally be enforced may be sufficient to sustain a promise; and an agreement to pay money on a party's not bidding at a sheriff's sale is not void as being contrary to public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land. *Ib.*, O. S. 191.

Notes payable in work—Action—Demand.—3. Where an action was brought on notes payable in work:

Held, that the plaintiff could recover without proving a demand and refusal to do some specific work, it being incumbent on the defendant to offer to perform work for the plaintiff. *Teal v. Clarkson*, iv. O. S. 172.

STONE.

See COVENANT, II(2), 6.—RIDEAU CANAL, 2.—TRESPASS, I. 2.

A person who tortiously removes stone from another's land and works it into mill stones, acquires no property in it thereby so as to enable him to maintain trespass against the owner of the land, who has taken the mill stones into his possession. *Baker et al. v. Flint*, iii. O. S. 89.

STOPPAGE IN TRANSITU.

See PRINCIPAL AND AGENT, 8.

STRANDING.

See GENERAL AVERAGE, 1, 2.

STREET SURVEYOR.

How protected under the statutes.—A surveyor of streets appointed under the provincial statute 9 Geo. IV. ch. 9, does not come within the protection of 50 Geo. III. ch. 1, which requires actions for anything done under that statute to be brought within three months; nor is he entitled to notice of action under 24 Geo. II. ch. 44, although *semble* entitled to the protection of that statute as to the action being brought within six months. *McFarlane v. McDougall*, III. O.S. 73.

STREETS.

See HIGHWAY.

SUBMISSION.

See ARBITRATION AND AWARD, I.

SUBPŒNA.

See NEW TRIAL, III. 4.

Witness — Time for attendance under subpœna.]—1. When a witness is subpœnaed to attend the assize on a particular day, and not from day to day, he cannot be attached for disobedience to the subpœna if he were present on that day but went away afterwards. *Rainville v. Powell, In re*, P. C. Hagerman, J., iii. U. C. R. 128.

[It would seem that the learned judge in this case doubted that the sum paid the witness would cover his expenses for a longer period than one day. In *Scholes v. Hilton*, x. M. & W. 15, it was held that a subpœna requiring a party to attend the trial of a cause on the commission day of the assizes extended to the whole assizes, and that it need not go on to require his attendance from day to day until the cause be tried.]

Issued at Nisi Prius—Court in banc. no power.]—2. The Court in banc. have no power to punish by attachment a witness disobeying a subpœna issued at Nisi Prius by the clerk of assize. *Regina v. Kerr*, iii. U. C. R. 247.

3. *Semble*: The Court at Nisi Prius might, upon a proper application, punish a witness for contempt of its authority in disobeying a subpœna. *Ib.*

On criminal information — teste and return.]—4. It is not necessary that there should be fifteen days between the teste and return of a subpœna on a criminal information where the venue is laid in the Home District. *Regina v. Crooks*, Easter Term, 3 Vic.

Insufficiency of time—Attachment refused.]—5. An attachment for not obeying a subpœna was refused against a witness who resided twenty-five miles from the assize town and had been subpœnaed only the day before

the cause was tried. *Fairclaim dem. Thompson v. Putman*, Mich. Term, 6 Will. IV.

[To ground a motion for an attachment against a witness, the affidavit must state that the party was a material witness—*Finley v. Porter*, ii. M. & W. 822: yet the evidence being immaterial will not justify wilful disobedience. *Scholes v. Hilton*, x. M. & W. 16, and *Chapman v. Davis*, 3 M. & G. 609.]

SUMMONS (WRIT OF).

See BAILIFF, 3.—DOWER, II. 12, 13. PARLIAMENT, 2 et seq.—PROCESS, passim.—REPLEVIN, ETC., 3.

SUMMONS OR RULE TO COMPUTE.

See ATTORNEY, IV. 4.—PRACTICE, II. 8.

SUNDAY.

See ARREST, I. 31.—ATTORNEY II(1) 3.—BILLS OF EXCHANGE, ETC. III. 10.—MONEY HAD AND RECEIVED, 14.

Exercise of ordinary calling.]—1. To avoid a contract made on a Sunday, it must be shewn to be in the ordinary calling of the party making it. *Bethune v. Hamilton*, Hil. Term, 4 Vic.

Sales.]—2. Under the second clause of the 8th Vic. ch. 45, all sales of real and personal property made on a Sunday are void. *Lai v. Stall*, vi. U. C. R. 506.

Mortgages.]—3. *Semble*: That mortgages would not be void. *Ib.*

4. The giving or taking in security on a Sunday is not void as a "buying or selling," within the provincial statute 8 Vic. ch. 45, sec. 2. *Wilt v. Lai et al.*, vii. U. C. R. 535.

SUPERSEDEAS.

See ABSCONDING DEBTOR, 4, 5, 12, 22.—ARREST, II. 8, et seq.

SURETY.

See ABSCONDING DEBTOR, 9, 19.—BOND, II. 17.—DIVISION COURT, 5, 6.—EXECUTOR ETC., I. 12.—LIMITS, II. 15.—PRINCIPAL AND SURETY.—REPLEVIN ETC., 7.—SCIRE FACIAS, 6.—SHERIFF, V.

SURRENDER.

See DISTRESS, II. 6.

Surrender, by act of law, by matter of record.—1. A tenant in fee may surrender his estate back to the Crown by act and operation of law, as by accepting a new grant for the same land, or he may surrender by matter of record; but a surrender not of record, or a surrender by record, founded on an invalid title, is insufficient. *Doe dem. McDonnell et al. v. McDougall et al.*, iii. O. S. 177.

Conveyance in fee to lessee a surrender of lease.—2. A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors and voidable as to them, is nevertheless as between the lessor and lessee a merger of the lease, or more properly a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession. *Doe dem. McPherson v. Hunter*, iv. U. C. R. 449.

[The surrender takes place in spite of the intention of the parties.—*Lyon v. Read*, xiii. M. & W. 285, discussed 2 Smith's Leading Cases, 459a—459i. In *Doe dem. Biddulph v. Poole*, 12 Jur. 450, 17 L. J. Q. B. 144, will be found a judgment given upon the effect of a surrender by the acceptance of a new lease: it was there decided that to operate as a surrender, the estate passing by the new lease must be such as contemplated by the parties at the time.]

Falsa demonstratio—Miscalculation in the number of acres.—3. A., according to the statute 8 Geo. IV. ch. 1, surrendered to the Crown in consideration of 636*l.* 5*s.* received by him, "all that parcel of land overflowed and covered with water, being and composed of lots 37, 38, 39, in the first concession of the township of Kingston, containing by admeasurement 462 acres more or less, and more particularly described in the plan thereof hereunto annexed, to the intent that the said land and premises covered with water shall forever hereafter be vested in, and enjoyed by His Majesty, his heirs and successors, free from all incumbrances." There was attached to the deed a plan verified by one Burke, the surveyor who made it, and a certificate signed by him on the face of the plan in these words—"I do hereby certify that the above diagram is drawn from actual survey, and in actual accordance with the deed held by the proprietor, and that there are 462 acres 16 roods permanently covered with the waters of the Rideau canal." Across the land from one side to the other was drawn an irregular line, exhibiting on the one side, (which was the front end of the lots,) the 462 acres surrendered to the government, as being covered by the overflowing of the canal, and on the other side, or in rear of this line, 123½ acres which was marked "land." Afterwards A. conveyed to B. "all those certain parcels of land in the township of Kingston, and being the rear parts of lots 37, 38 and 39, (as laid down on a certain plan drawn by Mr. Burke the surveyor), in the fifth concession of the township of Kingston, and by the said Burke stated to contain 124½ acres." The land surrendered to the Crown had been paid for to A. at a price per acre, assuming it to contain 462 acres according to Burke's survey; but it afterwards turned out that the plan did not correspond with the fact, the survey being extremely inaccurate, for that

there was not as much land covered with water as the plans represented by 141 acres. *Held per Cur.*, that the deed made to B. carried only such land (123½ acres), as upon the scale of measurement upon which the plan was framed formed the area in rear of the irregular line drawn across the lots, without regard to the fact of what portion of the lots was actually covered with water, and that the whole 462 acres, had, under the deed of surrender, vested in the Crown.—Robinson, C. J. dissentiente, who held—1st, that the plan must be regarded as a part of the deed, and read as part of the description in both conveyances; 2ndly, that the deed to B. taken with the plan, shewed clearly that what was meant by the “rear parts of the lots” to be conveyed to B., was all the land back of the line which marked the rear or northern boundary of that before surrendered to the Crown for the use of the canal; 3rdly, that in order therefore to determine what could be held under this grant of the rear parts, it was necessary first to decide what had passed to the Crown by the surrender; 4thly, that by the surrender the Crown only acquired that portion of the land which was covered with water, both the deed and the plan shewing that nothing more was intended to be passed; and that the surveyor having laid it down inaccurately on his sketch according to his scale, and having miscalculated the number of acres was a mere falsa demonstratio, which could not overrule the more substantial part of the description: 5thly, that the effect of the first deed was to vest in the Crown all the portion of the land overflowed by the canal, and that the second deed to B. conveyed all that lay in rear of the water mark. *Doe dem. Gildersleeve v. Kennedy*, v. U. C. R. 402.

Evidence to support plea of surrender.]—4. The mere allegation in a plea “of a surrender of a term of years

to the defendant by the plaintiff,” makes it incumbent on the defendant to prove an actual surrender made by the plaintiff by deed or note in writing, sufficient under the third clause of the Statute of Frauds. Where the surrender relied upon is one produced by act and operation of law, it must be so pleaded. *McNeil v. Train*, v. U. C. R. 91.

Covenant by landlord—Plea by tenant of a surrender to the Queen by a third party.]—5. To an action of covenant by a landlord against his tenant, it is a bad plea to plead a surrender by a third party (whose legal estate is not shewn to have been derived from the plaintiff) to the Queen, and that therefore the land at the expiration of the lease did not belong to the plaintiff. *Russell et ux. v. Graham*, vi. U. C. R. 497.

SURROGATE COURT.

See ARREST, II. 7.—LETTERS OF ADMINISTRATION.

SURVEY.

See BOUNDARY LINE COMMISSIONERS, 2, 3, 4, 5, 6 —FREDERICKSBURGH. KINGSTON (TOWNSHIP OF).—MONUMENTS.—SIDE LINES.

Alteration of original posts previous to grant—59 Geo. III. ch. 14.]—1. In regard to a survey made before the 59 Geo. III. ch. 14, the provisions of that act will not have the effect of necessarily confining the grantee to the land designated by the posts planted in the original survey, if the plan of survey had been altered by the government before the issuing of the patent and before the passing of that statute; therefore, where the government had added to the ends of the several concessions a strip of land which the surveyor had left unsurveyed between his

concessions and the adjoining townships, and in consequence of such addition had changed the numbering of the lots throughout the concession: *Held*, that the grants issued in accordance with such reformed survey would cover the land which the government intended to be included within the boundaries expressed in the patent, though the number of the lots would not correspond with the posts set by the surveyor. *Doe dem. Talbot v. Paterson*, III. U. C. R. 431.

Erroneous Survey—Compensation for improvements.—2. The 59 Geo. III. ch. 14, sec. 2, which gives compensation to defendants in ejectment for improvements made by them in consequence of erroneous surveys, applies as well to surveys made upon request of individuals as by public authority, and to surveys made as well since as before the passing of the act, and although the occupation of the defendant may have commenced since the passing of the act. *Doe dem. Gallagher v. McConnell*, Easter Term, 5 Vic.

3. Under what circumstances the defendant in an action of ejectment can claim compensation for his improvements before he can be dispossessed under the judgment. See *Doe dem. Hare et al. v. Potts*, v. U. C. R. 492.

[Also see *Doe dem. Moule v. Campbell*, viii. U. C. R. 19.]

TAXATION OF COSTS.

See ATTORNEY, III. 6, 11, 16, 18.—COSTS I(1), 22; VI. 4; VIII. 1, 8, 11.—MESNE PROFITS, 17.—NEW TRIAL, IX. *passim*.

TAXES.

See COVENANT, II(2), 8.—DIVISION COURT, 1.—LEASE, I. 7.—MANDAMUS, 9.—MONEY HAD AND RECEIVED, 12.—RATE COLLECTOR.—SHERIFF'S DEED, 1.—TITLE, 17.

Lands not liable for taxes.—1. Land which has not been described by the surveyor general is not liable to be sold for taxes. *Doe dem. Bell v. Orr*, Hil. Term, 7 Wm. IV.

2. But lands "described as granted" by the surveyor general are taxable under 59 Geo. III. ch. 7, although no letters patent for them have ever issued. *Doe dem. McGillis v. McDonald*, Easter Term, 4 Vic.

Sale—Ejectment by purchaser—Proof required to support his title.—3. In ejectment by the purchaser of land sold for taxes at sheriff's sale, under 6 Geo. IV. ch. 7, it is necessary for him to prove that the writ to sell was grounded on the treasurer's return shewing arrears of taxes for eight years, and that there was no sufficient distress on the land to levy the amount; *and semble*, it is also necessary to prove that the land had "been described or granted." *Doe dem. Bell v. Reaumore et al.* III. O. S. 243.

[So *Doe dem. Bell v. Orr*, Hil. Term, 7 Wm. IV., and *Doe dem. McGillis v. McDonald*, Easter Term, 4 Vic.]

4. He need not shew that all the necessary formalities were attended to, such as advertising, &c. *Doe dem. Bell v. Orr*, Hil. Term, 7 Wm. IV.

5. Nor is it necessary that he should shew that the writ under which the lands were sold was in the sheriff's hands for the period required by law. *Doe dem. McGillis v. McDonald*, Easter Term, 4 Vic.

Stranger may pay taxes on land and prevent forfeiture.—6. A stranger may pay taxes on land without the consent of the owner at the time, and a redemption by a stranger before the year is out after the sale is sufficient to prevent the forfeiture, though done without the knowledge of the owner. The time of redemption excludes the day on which the sale takes place, and the expression "from the time" may be held as either inclusive or exclusive of the day, according to the context in

the statute and the bearing and object of its provisions. *Boulton v. Ruttan*, II. O. S. 362.

Redemption improperly certified—Treasurer liable.]—7. If the treasurer certify a redemption improperly he is liable, and not the sheriff refusing to make the conveyance. *Ib.*

Action against sheriff for not conveying—Declaration]—8. In a declaration in case against a sheriff for not conveying lands sold under the assessment law, an averment that the sale took place on the 22d July 1830, and that "afterwards, and at the expiration of twelve calendar months from the time of such sale, to wit, on 22d July 1831, the plaintiff demanded a deed," was held sufficient on general demurrer. *Held also*, that it was unnecessary to aver that there was no sufficient distress on the lands, or that a deed was tendered to the sheriff for execution. *Spafford v. Sherwood*, iii. O. S. 441.

Legality of sale after a division of the district in which land lies.]—9. A sale of lands made before the passing of the act 8 Vic. ch. 22 in the district of Colborne for arrears of taxes, part of which had accrued due before the division of the district of Newcastle, (of which Colborne was formerly a part), is a legal sale.—(McLean, J. dissentiente.) *Doe dem. the Earl of Mountcashel v. Grover*, iv. U. C. R. 23.

8 Vic. ch. 22, retrospective.]—10. The statute 8 Vic. ch. 22 is a declaratory act, retrospective as well as prospective.—(McLean, J. dissentiente.) *Ib.*

Illegal sale, taxes being paid.]—11. If a writ has been issued for the sale of land for taxes, but before sale under it the taxes are paid, the sale is illegal and void. *Howe et ux. v. Thompson*, Mich. Term, 6 Vic.

Evidence as to sufficiency of distress.]—12. In ejectment by a sheriff's vendee of lands sold for arrears

of taxes, it is sufficient to entitle the plaintiff to recover if it appear from the defendant's evidence that there was not a sufficient distress upon the land; and proving that there were some few pieces of wood and timber that had been cut down by trespassers and left by them on the lot to be prepared for the market, is not sufficient evidence of distress being on the land to prevent the necessity for the sale. *Doe dem. Powell v. Rorison*, ii. U. C. R. 201.

Proof of sufficient distress—Verdict for defendant—New trial.]—13. Where in ejectment by a sheriff's vendee of lands sold for taxes the jury found for the defendant on the ground that there was a sufficient distress on the premises to satisfy the taxes, the Court will not set aside the verdict and grant a new trial, although it may be doubtful whether much too high a value has not been put upon the distress. *Doe dem. Powell v. Craig*, ii. U. C. R. 208.

Taxes accruing on whole lot—Distress on part, when lot divided.]—14. Where taxes have accrued upon the whole of a lot of land while it is undivided, and a distress can be made upon part of the lot, no portion of the lot can be sold for such taxes. *Stafford v. Williams*, iv. U. C. R. 488.

Sale when no arrears of taxes and sufficient distress, illegal.]—15. The surveyor general made a return to the treasurer of the London district headed thus: "Township of Dorchester, southern division, broken front concessions A. and B., south part to John Reilly, Jr., 100 acres, north part to Dudley McPhee 200,"—thus returning the 200 acres as the north part of broken front concession A. and B., treating it as one tract, and not distinguishing how much was in concession A., and how much in B. The treasurer did not open his account in accordance with the surveyor general's return, charging the assessment against the north part of 22 in broken front

concession A. and B. 200 acres, but of his own accord opened a separate account against north half of lot 22 in broken front B. 100 acres, and returned it as in arrear for taxes, upon which return it was sold. It was admitted that if the assessment had been charged against the 200 acres as returned by the surveyor general, there had always been an ample distress upon the premises, and it was proved at the trial that the parties who had paid taxes on the lot having title to the whole lot of 200 acres, had paid taxes on the whole 200 acres, and not separately on any part of it: *Held*, that under these circumstances the sale of the north half of lot 22 in broken front B. 100 acres was illegal and void on two grounds—1st, because it appeared that notwithstanding the return made by the treasurer, there was no arrear in fact of taxes subjecting the land to sale; and 2ndly, because at the time of the sale there was a sufficient distress on the premises. *Doe dem. Upper v. Edwards*, v. U. C. R. 594.

TENANCY AT SUFFERANCE.

See OVERHOLDING TENANT.

TENANCY AT WILL.

See EJECTMENT, I. 19, 22.—HEIR, 6. LANDLORD AND TENANT, I. 7, 8; II. 2.—LIMITATIONS (STATUTE OF), II. 13, 24.—TITLE, 1.

TENANCY FROM YEAR TO YEAR.

See EJECTMENT, I. 16.

TENANCY IN COMMON.

See ACCOUNT (ACTION OF), 1, 2.—AMENDMENT, II. 17, 18.—DEED, II. 9.—EJECTMENT, II. 1; III. 5. EXECUTOR ETC., I. 2.

Trover for selling the common property on an execution against one tenant.—1. A tenant in common of goods, which have been sold under an execution against his co-tenant's absolute property, cannot maintain trover against the sheriff who sold them, to recover the value of his share or interest in them. *Ecclestone v. Jarvis*, i. U. C. R. 370.

Ejectment—Proof of actual ouster, when dispensed with.—2. In ejectment by one tenant in common against another, if it be shewn that the common consent rule has been entered into, proof of an actual ouster is dispensed with. *Doe dem. Clarkson v. Haskins*, ii. U. C. R. 75.

Trespass q. c. f. by one tenant against another.—3. Where the plaintiff and the defendant being each possessed of a farm, agreed to work them together and divide the profits arising from them at the end of the season, and before the harvest the defendant was dispossessed of his farm by ejectment, and the plaintiff thereupon gave him notice that he would not divide his crops with him, notwithstanding which the defendant entered the plaintiff's farm and took away his share of the crop: *Held*, that the plaintiff could not maintain trespass against him. *Wemp v. Mormon et al.*, ii. U. C. R. 146.

4. One tenant in common may commit trespass by expelling his co-tenant and taking the whole enjoyment of the estate wrongfully to himself. *Petrie v. Taylour*, iii. U. C. R. 457.

TENANCY IN TAIL.

See ESTATE, 12 et seq.—EXECUTOR ETC., I. 4.—LEASE, II. 1.

TENDER.

See ARBITRATION AND AWARD, VI (2), 8.—CONTRACT, 13.

Sufficiency.]—1. A plea of tender is not supported by proof of an offer by the defendant to bring money which he does not produce, although the plaintiff says that he will not accept the sum mentioned unless a further sum be paid. *Thompson v. Hamilton*, Easter Term, 6 Wm. IV.

[“I am come with the amount of your bill,” the amount being less than the sum claimed: *Held* a good tender. *Hemwood v. Oliver*, 1 Q. B. 409.]

Opportunity of Inspection.]—2. A. sends a waggon to B. to make the wood work: B. having finished, sends the waggon in A.'s name to a blacksmith for the iron work: B gets the waggon back from the blacksmith: A. calls for the waggon: B. allows him to remove the box from his shop into the highway, but on his returning to the shop to take out the remaining part of the waggon, B. refuses to let it go till he is paid his bill: A. holds in his hands a quantity of notes and offers to pay B. his demand if he would tell him what it was: B. would not name any sum, and insisted upon detaining the waggon. *Held*, that it was for the jury to determine whether B. had not had full opportunity of seeing that A. was tendering him a sum sufficient to meet his demand, and if the jury were satisfied that he had, then that the tender was a good one, notwithstanding B. had refused to name the specific amount of his bill. *Milburn v. Milburn*, iv. U. C. R. 179.

Tender of deed—When proof of, dispensed with.]—3. A. agreed to pay B. for a lot of land upon receiving a deed: When B. offered the deed, A. declared his inability to pay, and proposed new terms which were accepted. *Held*, that B. was thereby relieved from the necessity of proving a tender of the deed to enable him to sue, or rescind the contract. *Mulgrew v. Pringle*, Dra. Rep. 282.

Plea.]—4. A plea of tender and refusal, and that the defendant was always ready to pay at a particular

place, held sufficient on general demurrer. *Thompson v. Hamilton*, Hil. Term, 7 Wm. IV.

Averment of sum tendered being sufficient.]—5. Where in trover for bills of exchange the defendant pleads a lien by agreement, and the plaintiff replied a tender, without averring that the sum tendered was sufficient—the replication was held bad on general demurrer. *Conger v. Hutchinson*, Hil. Term, 7 Vic.

TERM'S NOTICE.

See AMENDMENT, II. 32.

May be waived by agreement.]—1. An agreement between the parties takes away the necessity of a term's notice. *Gavan v. Lyon*, Tay. U. C. R. 624.

When necessary in general.]—2. Where four terms have elapsed since issue joined, a term's notice is necessary to be given before any subsequent proceedings, unless within the four terms a notice of intention to proceed has been given. *Henderson v. McCormick*, Tay. U. C. R. 568.

Before signing non pros.]—3. There is no necessity for a term's notice by a defendant signing a non pros, although four terms may have elapsed without any proceeding had. *Culver v. Moore*, Tay. U. C. R. 623.

Before assessment of damages.]—4. Where no proceedings had been taken in a cause for four terms, the Court set aside an assessment of damages for want of a term's notice. *Baker v. Garrett*, ii. O. S. 211.

[Also case 6, *infra*.]

To several defendants, one having given a cognovit.]—5. Action against two defendants, after issue joined, and after four terms had elapsed, but within a year; one of the defendants having been arrested, put in special bail, and gave a cognovit withdrawing his plea; the plaintiff proceeded against the

other: *Held*, that the other defendant was entitled to a term's notice. *Yates v. Carney et al.*, iii. O. S. 31.

After judgment by default.—6. A term's notice is necessary after judgment by default where no proceedings have been had for four terms. *Staals v. Reynolds*, iv. O. S. 5.

Not required in proceedings by defendant.—7. The rule that a term's notice must be given where no proceedings have been had for four terms, does not apply to proceedings by a defendant. *Doe dem. Young v. Hinman*, and *Doe dem. Young v. Smith*, Hil. Term, 2 Vic.

[Nor to a motion to set aside proceedings for irregularity, but only to any steps taken towards judgment. *Lumley v. Thompson*, iii. M. & W. 632.]

After verdict.—8. No term's notice is necessary where more than four terms have elapsed after verdict before the entry of judgment. *Russell v. Miller*, Hil. Term, 3 Vic.

[Acc: *Newton v. Boodle*, 3 C. B. 795, which decides that the rule requiring a term's notice is not applicable to any proceedings after verdict.]

TESTATUM ACT.

See AMENDMENT, I. 4, 6.—CAPIAS AD RESPONDENDUM, 4.—PARLIAMENT, 5.—PROCESS, 6.

Service of papers.—1. The Testatum Act, 8 Vic. ch. 36, now governs the mode of service of papers on defendants or their attornies. It has done away with the former mode of service provided by the rule of Court, Mich. Term, 4 Geo. IV. *Parke v. Anderson*, and *Parke v. Meade*, v. U. C. R. 2.

Outer districts—Time for appearance.—2. Under the 8th section of the 8 Vic. ch. 36, the defendant living in a district east of the Home district is entitled to *twelve* days' notice to appear on a testatum writ issued from the Niagara district—the Niagara district for the purposes of that act being held to be a district west of the Home district. *Graham v. Quinn*, iii. U. C. R. 183.

All proceedings must be had in the one district.—3. Under the Testatum Writ Act, the plaintiff cannot issue a testatum writ in an outer district to the Home district, and issue an alias from the Home district on filing the original there, as all the proceedings must be carried on in the same office. *Colquhoun et al. v. Connell*, ii. U. C. R. 178.

TESTE OF WRITS.

See AMENDMENT, I. 5.—CAPIAS AD RESPONDENDUM, 1, 2.—FIERI FACIAS, 4, 5.—PARLIAMENT, 7.—PROCESS, 1.—VENDITIONI EXPONAS, 1, 2, 3.

TIMBER.

See ARREST OF JUDGMENT, 11.—ASSUMPSIT, I. 11.—DEED, III. 5, 6.—TRESPASS, I. 14, 17.

TIME (COMPUTATION.)

See ATTORNEY, III. 1.—NOTICE OF ACTION, 14.—NOTICE OF TRIAL, 5. PRACTICE, I. 15.

TIME (PLEA OF.)

See BILLS OF EXCHANGE ETC., V 25.

TITLE.

See ALIEN, *passim*.—ARREST, IV. 6. COVENANT, II(2), 13.—CROWN GRANT, 13, 16, 17.—DEED, III. 4. EJECTMENT, I. 16, 17, 19, 22, 24, 25; VIII. 6, 9, 11, 12, 13.—ESTATE.—ESTOPPEL, *passim*.—EXECUTOR ETC., I. 7.—GOODS SOLD, 5.—JUDGMENT, 26.—LANDLORD AND TENANT, II. 1.—LIBEL AND SLANDER, I. 9.—LIMITATIONS (STATUTE OF), II.—MAINTENANCE (STATUTE OF).—MONEY PAID, 1.—NEW TRIAL, I. 12.—WITNESS, 24.

Debtor in possession, his title after sheriff's sale.—1. A debtor in possession of lands which have been sold for his debt at a sheriff's sale is quasi tenant at will to the purchaser, and cannot dispute his title, and a third person defending as landlord, but shewing no privity between the debtor and himself, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself. *Doe dem. Armour v. McEwen*, iii. O. S. 493.

Priority of title.—2. A purchaser at a sheriff's sale of lands sold on an execution against a devisee takes in preference to a purchaser on a subsequent execution, though prior judgment against the executors of the testator. *Doe dem. Auldjo v. Hollister*, Easter Term, 2 Vic.

Title of purchaser at sheriff's sale, under an irregular writ.—3. It is irregular to issue a fi. fa. against lands until after the return of the execution against goods, but as it is only an irregularity, a purchaser at sheriff's sale under the writ against lands cannot be affected by it. *Doe dem. Spafford v. Brown et al.*, iii. O. S. 92.

Recovery of damages by vendee for defect in vendor's title—Staying proceedings.—4. The Court will not compel a vendee of real property who has recovered from the vendor the amount of purchase money and interest for a defect in the vendor's title, to stay proceedings on his judgment until he gives up the possession of the land conveyed. The vendor must proceed by action to recover possession. *McKinnon v. Burrows*, iv. O. S. 71.

1 Wm. IV. ch. 26—*Private act.*—5. The provincial statute 1 Wm. IV. ch. 26, "vesting in a trustee certain lands belonging to the estate of the late Laurent Q. St. George, has not the effect of raising a presumption of title in the particular lands enumerated in the schedule so as to relieve his trustee from the necessity of shewing title

in the first instance. *Doe dem. Baldwin v. Stone*, v. U. C. R. 388.

Possession under contract to purchase—Failure in payments—Right of vendor to convey to a third party.—6. *Semble*: Where a party is let into possession of land under a contract to purchase, and failing to make good his payments for the land still remains in possession, although it would at the end of the period of limitation bar the vendor's right to recover in ejectment if there were no acknowledgment of his title, is not in the nature of a disseisin; and until such period of limitation has expired, the vendor has a good right to convey without first recovering possession. *Doe dem. Dettrick et al. v. Dettrick*, ii. U. C. R. 153.

Purchaser's title under sheriff's sale, when irregular proceedings anterior to judgment.—7. The purchaser's title to land under a sheriff's sale is prima facie good when the sale is made upon a legal writ, and a defendant seeking to defeat the sale on the ground of any defect in the proceedings anterior to the writ, must shew clearly and conclusively that there are those defects. *Doe dem. Boulton v. Fergusson*, v. U. C. R. 515.

8. The title of a purchaser at sheriff's sale is not liable to be defeated by irregularities in the proceedings anterior to the judgment. So long as the judgment subsist in full force, it supports the execution, and the execution supports the sale. *Ib.*

Deed revoking devise—Title of grantee.—9. A. devised to B., his son, "a certain parcel of land not less than sixty acres, nor to exceed one hundred, bounded above the road by Mr. Mason's west line, and to extend No. 24 west until he intersects with John Marsh"—which description not being sufficiently precise to mark out any certain piece of land, he made a deed some years afterwards, by which, for a consideration of 50*l.*, he bargained and sold to B. eighty acres of the

same lots of land, under a description which made out a certain tract, and which would include at least sixty acres of that which had been devised to B. *Held*, that the deed was a revocation of the devise to B., who could hold only such land as the deed covered. *Doe dem. Marsh. v. Scarborough*, v. U. C. R. 499.

Interest of tenant at sufferance, not sufficient to support a release.—10. A. received possession of land from B. A. died in 1846, and before his death A. and B. had been in continued possession of the land for more than twenty years.—A. died without issue and intestate, leaving his wife upon the land. C., his eldest brother and heir-at-law, claimed title and brought ejectment against A.'s wife; A.'s wife defended the suit, relying on a quit claim deed from B., who, upon giving up possession to A., had exchanged lands, and never having given A. his deed, as was alleged, now conveyed to his wife: *Held*, that A.'s wife, upon the death of her husband, being merely a tenant at sufferance, and having no interest upon which a simple release could operate, the release conveyed nothing, and the plaintiff was entitled to recover. *Doe dem. Connor v. Connor*, vi. U. C. R. 299.

Vendee's title at sheriff's sale—Proof of seizure.—11. *Seemle*: That in order to maintain a title as vendee at sheriff's sale, it is not necessary to prove an actual seizure antecedent to the sale and before the return of the writ. *Haydon v. Crawford*, iii. O. S. 583.

Ejectment by sheriff's vendee—Proof of execution.—12. In ejectment by sheriff's vendee for land sold in execution, the writ of execution is sufficiently proved by its award on the roll, without producing the writ itself, and the recital of the writ in the sheriff's deed is evidence of its delivery to him. *Doe dem. Stocking v. Watts*, Hil. Term, 6 Vic.

[Also, *SHERIFF'S DEED*, 2.]

Right of purchaser to recover against debtor's representative.—13. A purchaser of lands on an execution at sheriff's sale is entitled to recover in ejectment against the debtor or his representative, without proof of the debtor's title. *Doe dem. Fisher v. Chesser et al.*, Easter Term, 1 Wm. IV.

14. But if the tenant in possession do not claim under the execution debtor, the debtor's title must be proved. *Doe dem. Crew v. Clark*, Mich. Term, 4 Vic.

Right to recover against debtor's servant.—15. A purchaser at sheriff's sale, as the plaintiff in an action of ejectment against a defendant who is in possession, not as claiming any interest under a title independent of the debtor, or under any title but as a mere servant of the debtor, is not held to stricter proof of title against the servant in possession than he would be against the debtor himself. *Doe dem. Lyon v. Lege*, iv. U. C. R. 360.

[Proof to be given in an ejectment by a purchaser of land sold for taxes.—See *TAXES*, cases 3. 4 and 5.]

Right of purchaser to recover against parties claiming under debtor.—16. In an action of ejectment by a purchaser at sheriff's sale where the only question was, whether the defendant at the time of such sale had possession under the execution debtor or not, the title of the execution debtor need not be shewn. A. became purchaser at a sheriff's sale, and had a deed made to him by the sheriff on the 29th September 1845.—B., the execution debtor, went into possession of the land sold as devisee under his father's will, who died in 1835.—B., on the 28th of September 1842, leased the land to C. for three years, who enjoyed it for a year, when B., the debtor, having absconded from the province, D., a brother of the debtor B., purchased the tenant's interest and went into possession. Upon the tenant quitting the place he took from D. a written understanding to save him harmless against

B.—B., in February 1847, made a deed of the land to his brother who was then in possession, for the consideration expressed of 100l.—The deed was registered in July 1847.—The sheriff's deed to A. was not registered: *Held*, in an action of ejectment brought by A. against D., that upon these facts, D.'s possession at the time of the sheriff's sale was the possession of B., the execution debtor, through his tenant C., and that therefore A. was entitled to recover: *Held also*, that the non-registry of the sheriff's deed had no effect upon the title, it not having been shewn that the prior registered deed from B. to D. had been given for a valuable consideration. *Doe dem. Russell v. Hodgkiss*, v. U. C. R. 348.

Payment of taxes, how far available towards a title.—17. *Semble*: That the payment of taxes in itself signifies nothing, in making good a title under twenty years' possession. *Doe dem. McDonell v. Rattray*, vii. U. C. R. 321.

Evidence of pedigree, when prima facie case established.—18. To displace title made under a near relative capable of inheriting, it should be shewn that there is some one in existence representing the alleged elder branch of the family. *Doe dem. Park et al. v. Henderson*, vii. U. C. R. 182. *

TITLE (COVENANT FOR).

See COVENANT, I. 1, 6; II(1), 3, 5; II(2), 3, 12, 13.—*ESTOPPEL*, 5.—*EXECUTOR ETC.*, I. 10.—*HEIR*, 5. *NEW TRIAL*, IV. 2.

TOLLS.

See ALBION ROAD.—*CONVICTION*, 5, 9.—*CORPORATION*, 6.—*PORT BURWELL HARBOR COMPANY*.—*PORT CREDIT HARBOR COMPANY*.—*WELLAND CANAL*, 2.

Tolls demandable only once in 24 hours.—1. A person passing a toll gate more than once on the same day, could not, while the statute 3 Vic. ch. 53 was in force, be legally charged more than one toll in twenty-four hours. *O'Hara v. Foley*, iii. U. C. R. 216.

Illegal tolls—Summary conviction of toll gate keeper.—2. When tolls fixed by the commissioners are exacted by a toll gate keeper at a gate not six miles apart from the one previously passed, *the toll gate keeper*, under the 34th section of 3 Vic. ch. 53, is not liable to summary conviction. *Regina v. Brown*, iv. U. C. R. 147.

TORONTO AND LAKE HURON RAILROAD COMPANY.

Right to sue stockholders.—The City of Toronto and Lake Huron Railroad Company have under the operation of the act 8 Vic. ch. 83, amending the original act 6 Wm. IV., a right to sue in debt one of the original stockholders for an instalment due upon the stock *originally* subscribed and called in by the directors appointed under the original act of incorporation. *The City of Toronto and Lake Huron Railroad Company v. Crookshank*, iv. U. C. R. 309.

TORONTO (CITY OF.)

See BILLIARD TABLES, 1.—*CORPORATION*, 8.

Duty and liability of builders—By-law allowing them privileges.—1. By 4 Wm. IV. ch. 23, the corporation is empowered amongst other things to regulate and prevent the encumbrance of the streets; and a city ordinance made in pursuance of that power, allowing persons building houses to occupy a certain portion of the streets with their building materials is good; but any person who is building leaving those materials in the streets

under that ordinance must provide lights in the night, or he will be responsible for any accident that may occur from his neglect. *Hervey v. French*, Easter term, 3 Vic.

By-law for shooting dogs]—2. The corporation of the city of Toronto have power from time to time at their discretion to make by-laws by which dogs found running at large within the limits and liberties of the city, after proclamation of such by-laws, may be shot. *McKenzie v. Campbell*, i. U. C. R. 241.

TORONTO GAS COMPANY.

See GAS COMPANIES.

TOWN CLERK.

See DISTRICT COUNCIL, 13.

TOWN OF LONDON.

See LONDON (TOWN OF.)

TRANSFER OF DEBTS.

See ASSUMPSIT, I. 8.—GUARANTEE, 9

TREASON.

See EJECTMENT, VIII. 17.—INDICTMENT.

When property forfeited.]—1. The property of a person attainted for high treason is not forfeited until the attainder is complete. *Eastwood et al. v. McKenzie*, Hil. Term, 2 Vic.

Vesting of estate under 33 Hen. VIII. ch. 20.]—2. The estate of a traitor concerned in the rebellion of 1537, and who accepted the benefit of the provincial statute 1 Vic. ch. 10, is at once by such acceptance as much vested in the Crown under the operation of 33 Hen. VIII. ch. 20, sec. 2,

without office found as afterwards. *Doe dem. Gillespie v. Wixon*, v. U. C. R. 132.

TREASURER (COUNTY).

See DISTRICT COUNCIL, 8, 11.—DIVISION COURT, 4.—TAXES, 7.

TRESPASS.

See ARREST, I. 16.—ASSAULT AND BATTERY.—COSTS, VII. 1. 3.—PARTICULARS OF DEMAND, 8.

I. WHEN AND BY WHOM MAINTAINABLE.

II. PLEADINGS, EVIDENCE, AND DAMAGES.

I. WHEN AND BY WHOM MAINTAINABLE.

See ACTION, 1, 3, 5.—COMMON SCHOOLS, 2.—CONVICTION, 2.—CROWN GRANT, 2, 12.—CUSTOMS ACTS, 1, 3.—DISTRESS, II. 8.—EXECUTOR ETC., I. 2.—FALSE IMPRISONMENT, *passim*.—FIXTURES, 2.—HORSE.—LANDLORD AND TENANT, I. 3, 4.—MAGISTRATES, 1, 5, 10, 13.—RELIGIOUS SOCIETIES, 2. REVENUE LAWS, 8.—SHERIFF, I. 4, 5, 6.—STONE.—TENANCY IN COMMON, 3, 4.

By purchaser of a crop of wheat at sheriff's sale before entry into possession.]—1. A party purchasing a crop of wheat at sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field. *Haydon v. Crawford*, iii. O. S. 583.

Power to quarry stone—Excess of such power.]—2. Where a statute gave power to certain persons to enter on lands in the neighborhood of a bridge to quarry stone to keep the bridge in repair &c., doing no unnecessary damage therein: *Held*, that the

power must be strictly pursued, and that any abuse of it by excess is punishable in trespass. *Myers v. Howard et al.*, iv. O. S. 113.

Attorney a trespasser through his orders to the sheriff.—3. Where an attorney directed a sheriff not to give up the goods of A. seized under an attachment as the goods of B.: *Held*, that he became a trespasser by such direction. *Radenhurst v. McPherson et al.*, iv. O. S. 281.

Sufficiency of seizure by sheriff to support trespass.—4. A defendant against whose goods a sheriff had a writ of execution (which was afterwards set aside for irregularity), drove to the sheriff's office and gave his deputy a list of his property as seized, but without any actual seizure: *Held*, not sufficient to support trespass against the then plaintiff. *Hervey v. Alexander*, Hil. Term, 2 Vic.

Sale of timber—Trespass against the owner of the land for removing the wood.—5. A person clearing land under an agreement to receive the wood in payment of his labor may maintain trespass against the owner of the land for taking away the wood after it is cut down, although he has no possession in the land to enable him to maintain trespass *quare clausum fregit*. *Hamilton v. McDonell*, Easter Term, 2 Vic.

[This case does not shew an interest in land within the Statute of Frauds. See FRAUDS (STATUTE OF), I. 2.]

Proceedings by magistrates under a statute disallowed by Her Majesty.—6. Where an act had been passed by the provincial legislature which was subsequently disallowed by Her Majesty, but while it was in force the plaintiff had been convicted under it by the defendants as justices of the peace, and directed to pay a fine to be levied according to the act, and the fine not having been paid, a warrant was properly issued by the defendants for his arrest and imprisonment, which,

however, was not executed by the officer to whom it was directed until after the disallowance of the act was published in the Gazette: *Held*, that as the conviction and warrant were legal, that the defendants could not be considered as trespassers by the warrant being executed when the act was no longer in force. *Clapp v. Laurason et al.*, Easter Term, 5 Vic.

Sufficiency of property or possession.—7. Where the owner of a lot of land encroached upon an adjoining lot belonging to the Crown, and took three successive crops off it without any permission from the Crown, and another person who had taken possession of the same land also without license about ten years before, and paid taxes, and made clearings on it, warned off the owner of the other lot after he had taken the third crop, and then cropped the land himself: *Held*, that the owner of the adjoining lot had no property nor possession to maintain trespass against him for that crop. *Killichan v. Robertson*, Mich. Term, 6 Vic.

Continuing trespass.—8. Where the defendant, as agent of a third party during the occupancy of a tenant of the plaintiff, put up a fence on the plaintiff's land which continued there after the plaintiff resumed possession at the expiration of the tenancy: *Held*, that the plaintiff could not bring trespass against the defendant for the act done by him during the continuance of the lease. *Boulton v. Jarvis*, Hil. Term, 6 Vic.

Trespass for fixtures severed from freehold.—9. Where in trespass for taking away millstones, mill machinery, wheels &c., the defendant pleaded not possessed, and it appeared that the injury was done by severing *fixtures*, in the mill and taking them away: *Held*, that the action was well brought, as when they were severed they became personal property, for which the owner could maintain trespass. *Myers v. Marsh*, ii. U. C. R. 148.

Toronto Club House—Trespass for disturbing servant in rented apartments.—10. Pleading, as to the mode of setting out an alleged demise from the Toronto Club of certain rooms and apartments in the club house to a servant or steward of the club, who relied upon the said demise as giving him an exclusive possession upon which he could maintain trespass. *Semble*, that under the demise as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments. *Williams v. Herrick*, v. U. C. R. 613.

Locus formerly used as a public road.—11. Where in trespass quare clausum fregit, it appeared that the land for the trespass to which the action was brought had been used for some years as a public road, although it was wholly on the plaintiff's land, the public allowance for road not having been found suitable, and afterwards, by order of the magistrates in sessions, a new road was laid out, also on the plaintiff's land, but nearer to the public allowance, and the plaintiff then stopped up the first road, but the defendants cut down some trees which had been used to block it up and dug up the soil: *Held*, that the plaintiff was entitled to maintain trespass against them. *Borrowman v. Mitchell et al.* ii. U. C. R. 155.

Disputed boundaries—Right of party, taking possession against protest, to sue for a trespass.—12. Plaintiff and defendant own adjoining lots of land; they had a fence between them supposed to be on the true division line; a correct line is however run, and the defendant is found to be encroaching some acres on the plaintiff's land; the plaintiff takes possession of the disputed piece of ground, under a protest from the defendant, and cultivates

it: when the crop is fit to cut, the defendant enters and takes it away.—The plaintiff sues the defendant in trespass: *Held*, that the plaintiff had such a possession as would enable him to maintain an action of trespass. *Gallagher v. Brown et al.*, iii. U. C. R. 350.

Right of one person buying land for another to sue for trespass.—13. A., living abroad, sends to an agent in this province to purchase a lot of land for B., who was living in the province, and to take the conveyance to himself, (A.) This is done, and B. is put in possession of the land, who from thenceforth uses and cultivates for his own benefit.—At the time of purchase a crop of wheat was in the ground: *Held*, that B., and not A., should sue in trespass for cutting and carrying away the wheat. *Quere*: Did the property in the wheat belong to A. or B.? *Campbell v. Cushman*, iv. U. C. R. 9.

Right to cut certain trees not sufficient possession.—14. Where a plaintiff has a right to cut down a *limited number of trees* upon land, and not the exclusive right to cut *all the trees*, he has not that possession of the land which will entitle him to bring an action of trespass quare clausum fregit. *Monahan v. Foley et al.*, iv. U. C. R. 129.

[Also, case 17, *infra*.]

Stranger or bailiff merely taking an inventory of plaintiff's goods.—15. If a stranger, having no legal process, goes to a defendant in execution and takes down in his presence a list of his goods and tells him he must not remove them, and does nothing more, he cannot be sued in trespass. So, if instead of a stranger, a bailiff has so acted, under a legal process, he may have bound the property as against other writs, but he cannot be sued in trespass, as he neither removed, detained nor handled the goods. *Cameron v. Lount*, iv. U. C. R. 275.

Proof of plaintiff's liability for a trespass by a sheriff's bailiff.—16. The writ of fi. fa. and warrant to the bailiff must be proved, or its production accounted for, in order to charge the plaintiff in the execution with an act of trespass committed by the bailiff. *Ib.*

Exclusive possession necessary.—17. A party obtaining from the Crown agent a license to enter upon certain land, and to cut such a quantity of timber of particular dimensions as he might require, not having by such license the exclusive possession of the land, cannot maintain trespass. *McLaren v. Rice*, v. U. C. R. 151.

What amounts to exclusive possession.—18. Where A. has once given peaceable possession of land to B.; A., by re-entry without B.'s consent, cannot acquire possession such as will entitle him to bring an action of trespass against B. *McNeil v. Train*, v. U. C. R. 91.

19. In an action of trespass quare clausum fregit, where the possession was disputed, the defendant proved that the plaintiff's brother was in possession of the close to work it for him (the plaintiff) on shares: *Held*, that the agreement did not conclusively establish the relation of landlord and tenant, and shew the brother entitled to the exclusive possession. *Dockstader v. Baird*, v. U. C. R. 391.

Action by prochein amy.—20. The mother in possession of land belonging to the heir, a minor, may sue in trespass quare clausum fregit, as the real friend of the minor. *Johnson v. McGillis*, vii. U. C. R. 309.

Joint trespassers—Discharge of one, discharge of both.—21. Where a plaintiff by his own act—as by a reference and an award—has knowingly discharged one of two joint trespassers, he cannot bring an action against the other. *Adams v. Ham*, v. U. C. R. 292.

II. PLEADINGS, EVIDENCE, AND DAMAGES.

See AMENDMENT, II. 15.—ARBITRATION AND AWARD, IV(3), 8.—ARREST OF JUDGMENT, 5, 11.—ASSAULT AND BATTERY, passim.—DE INJURIA, 2.—DISTRESS, II. 1, 6.—EVIDENCE, V. 4; VII. 2.—FALSE IMPRISONMENT, passim.—FENCES, 2.—FIXTURES, 1.—GENERAL ISSUE, 2, 3, 4, 5.—LANDLORD AND TENANT, I. 8.—MESNE PROFITS, passim.—NEW ASSIGNMENT, 2, 3.—NEW TRIAL, II. 23.—PLEADING, I. 16; II. 4, 11, 12, 41; III. 5; IX. 1.—SHERIFF, III. passim. VERDICT, 4, 9.—WITNESS, 21.

Declaration, charging imprisonment with force and arms.—1. A person who is charged in a declaration with causing another to be imprisoned, laying the act with force and arms, is charged with committing a trespass. *Fergusson v. Adams et al.*, v. U. C. R. 194.

2. A declaration in trespass, charging the defendant with having caused the plaintiff to be assaulted and imprisoned, is good. *Robertson v. Cooley et al.*, vii. U. C. R. 21.

[Also, see case 21, *infra*.]

Justification of trespasses, the locus being a highway.—3. Where it is intended in trespass to justify that the locus in quo was a highway, the averment must be direct, not left to inference; and a justification in a second plea for entering such of the closes as are not included in the limits of the highway alluded to in the first, will also be insufficient. And a plea proposing to justify the cutting down trees on the adjacent land to repair the highway, must mention the number and the description of the trees cut down. *Orser v. McMichael et al.*, Tay. U. C. R. 490.

Locus—Variance in name of the township.—4. In trespass quare clausum fregit and for destroying goods, the township laid is descriptive, and must

be proved as laid; and if the trespass be proved to have been in another township, the variance will not be cured, because the township laid has the same name with the county in which the true township is situate. *Mattice v. Farr et al.*, Tay. U. C. R. 289.

Plea to a count for cutting down trees &c., answering too much.—5. Where a declaration in trespass contained two counts, the one for cutting down trees, and the other for carrying them away, and the defendant justified as to the cutting down the trees in the said declaration mentioned, because the close in which the said trees were growing was his soil and freehold, whereupon in his own right he committed the said several trespasses in the said close, in which, &c., and the plaintiff demurred specially, because the introduction was inconsistent with the body of the plea, being in bar of only part of the trespasses, whereas the body was in bar of all the plea, the plea was held sufficient. *Ostrom v. O'Connor*, iii. O. S. 571.

Joint trespass—Declaration.—6. Where the plaintiff (defendant on a *capias*) sues the sheriff and the plaintiff in the writ arresting him, as joint trespassers, he must take care that his record of the pleadings does not shew him to be proceeding against the sheriff for one act of trespass, and against the plaintiff in the writ for another act of trespass. Where the record does shew this, the Court will set aside a verdict obtained by the plaintiff against both the defendants on the issues raised. *Eccles v. Moodie et al.*, iv. U. C. R. 250.

Admission of a highway in pleading.—7. Where in trespass *quare clausum fregit* to a plea of soil and freehold in the King, and a public highway thereon, the plaintiff replied soil and freehold in himself, and not in the King: *Held*, that the replication put in issue only the question of soil

and freehold, the highway being admitted. *Helliwell v. Eastwood et al.*, Easter Term, 6 Wm. IV.

Trespass q. c. f.—Plea, liberum tenementum.—8. The plea of *liberum tenementum* to a declaration in trespass *quare clausum fregit*, and carrying away the plaintiff's hay and corn &c., is bad on demurrer. *Wilcox v. Montgomery*, Mich. Term, 7 Wm. IV.

Several counts—Evidence supporting one count only.—9. If in trespass against several defendants the plaintiff prove a joint trespass against all on one count, and then attempt, but fail to prove a trespass against all on another count, he is still entitled to recover for the trespass first proved. *Watson v. Riorden et al.*, Mich. Term, 7 Wm. IV.

Trespass q. c. f.—Description of locus.—10. In trespass *quare clausum fregit*, a house, in one part of which the plaintiff's shop was kept, and in the rest of which the plaintiff's clerk and his family resided, although the plaintiff never resided there, was held to be properly described as the plaintiff's dwelling house. *Beatty v. McMaster et al.*, Trin. Term, 2 & 3 Vic.

Trespass q. c. f.—'Close' and 'house' not synonymous.—11. In trespass to a dwelling house, it is a bad plea to plead that the close in which &c., is the close of the defendant, but in trespass *quare domum fregit*, and taking away the goods of the plaintiff, it is a good plea to the taking away the goods that they are not the goods of the plaintiff. *Vail v. Noble et al.*, ii. U. C. R. 142.

One close in question—Plea putting several in issue.—12. Where in trespass for breaking and entering a close of the plaintiff, the defendant pleaded that the said closes in which &c., were not, nor was either of them the close of the plaintiff, the plea was held bad on special demurrer. *Woodruff et al. v. Davis*, ii. U. C. R. 404.

Issue of title to the close.—13. To a declaration in trespass quare clausum fregit, setting out the close by metes and bounds, the defendant pleaded that the part of the close on which the alleged trespass was committed was his close, and the plaintiff replied that the close mentioned in the declaration was his close, and not the close of the defendant as stated in the plea, the replication was held good on special demurrer. *Hiscott v. Cox*, i. U. C. R. 489.

[Also further, see cases 29 and 30, *infra*.]

Trespass q. c. f.—Plea to a new assignment.—14. Where in trespass quare clausum fregit the plaintiff set out the close by different abutments in two counts of his declaration, and the defendant justified under a right of way, setting out the abutments of the way in his plea, and the plaintiff new assigned the trespasses in other and different parts of the closes, and out of the right of way, and the defendant pleaded a right of way to the new assignment, setting it out as running *between* the closes mentioned in the declaration, but did not state that it was another and a different highway from that mentioned in the plea to the declaration, the plea to the new assignment was held bad on special demurrer. *Hodgkinson v. Donaldson*, ii. U. C. R. 539

Plea justifying all trespasses—New assigning another trespass.—15. A replication newly assigning a different trespass from that by the plea justified, when the plea justifies all the trespasses complained of, is bad on special demurrer. *Cameron v. Lount*, iii. U. C. R. 453.

[See further, case 25, *infra*.]

Trespass for taking cattle—Justifications by pound-keeper, and purchaser at the sale.—16. In trespass against two defendants for seizing and taking cattle, one defendant justified as pound-keeper, and because the cattle were in the close of A. wrongfully,

and trespassing in the said close and eating grass and corn thereon. A. took the said cattle trespassing and delivered them to the defendant as a pound-keeper within his jurisdiction, and the defendant impounded them and afterwards sold them according to law, and the other defendant justified the seizure by the pound-keeper as in the other plea, and the sale by him, and that the defendant bought the cattle at the sale as the highest bidder, and the plaintiff demurred generally to both pleas: *Held*, that the plea by the pound-keeper was bad, as it did not shew that he received the cattle from a person within his division, or that the close was so situated, and the plea of the purchaser good, as he could not be liable to the plaintiff in trespass. *Clarke v. Durham et al.*, Easter Term, 3 Vic.

Justification by a pound-keeper as such.—17. In a plea of justification by a pound-keeper for taking a pig, when the justification was that the pig, contrary to the township regulations, broke through a lawful fence; it was held necessary to allege that the fence was within that township, and to shew the close in which the pig was trespassing at the time of seizure. *Carey v. Tate*, Easter Term, 4 Vic.

Justification, under writ of possession.—*Trespass q. c. f.*—18. Where, in trespass quare clausum fregit the defendant attempted to justify under a writ of possession, and put in a judgment for lands in the same township generally, not describing them, and a scire facias to revive that judgment, on which the plaintiff had been summoned as terre tenant, and a judgment on the scire facias, each as general in the description of the lands as the judgment against the casual ejector; the plaintiff not having been in possession when judgment was entered against the casual ejector.—the Court held that the justification was not complete, without shewing that the plaintiff had been

connected with the proceedings in ejectment. *Reeves v. Meyers*, i. U. C. R. 462.

When such justification sufficient.]—19. Where however, in trespass quare clausum fregit, the defendant justified as in the last case, and the plaintiff new assigned a trespass to other closes, to which the defendant pleaded not guilty, and at the trial only one trespass was proved: *Held*, that the justification was sufficient; and the plaintiff having obtained a verdict, a new trial was granted. *Marsh v. Myers*, Easter Term, 4 Vic.

Trespass—Justification, as preventing a breach of the peace.]—20. To an action of trespass for breaking and entering the plaintiff's house, the defendant pleaded that the plaintiff was violently assaulting his (the plaintiff's) wife and child, and that he entered, &c., as he might lawfully might do, to prevent the plaintiff committing the said breach of the peace: *Held*, plea bad in substance. *Rockwell v. Murray*, vi. U. C. R. 412.

Trespass against a justice for false imprisonment — Declaration.]—21. It is a good count in trespass against a justice of the peace, on motion in arrest of judgment, that he with force and arms issued his warrant, whereby he caused the plaintiff to be arrested and wrongfully imprisoned without any reasonable cause, contrary to law and against the will of the plaintiff, and until the plaintiff gave his promissory note to A., to obtain his discharge from the imprisonment. *Brennan v. Hate-lic*, Easter Term, 5 Vic.

Trespass q. c. f.—Justification under award of boundary commissioners.]—22. In trespass quare clausum fregit the defendant justified his entry under an award of boundary commissioners, awarding the possession of the locus in quo to the defendant, and averred that he entered into the land under the award as his freehold: *Held*, bad on general demurrer, as the com-

missioners had no power to award the possession, and the plea did not amount to liberum tenementum. *Villaire v. Cecille et al.*, Easter Term, 5 Vic.

“Trespases” and “grievances,” not synonymous.]—23. A plea in trespass, that the defendant is not guilty of the “grievances,” instead of the “trespases,” is bad on special demurrer. *Clute v. McPherson*, Hil. Term, 7 Vic.

Trespass q. c. f.—Justification under distress—Replication, surrender.]—24. Where, in trespass quare clausum fregit et de bonis asportatis, the defendant justified the seizure of the goods on a distress for rent under a demise to one A., and the plaintiff replied that before the rent distrained for became due A. died, and the defendant and A.'s executor joined in the demise of the same premises to the plaintiff, under which the plaintiff entered and occupied—the replication was held on demurrer to be a good answer to the plea, as the demise to A. was surrendered and determined by the new demise to the plaintiff: *Held also*, that a plea of a distress for the rent under the demise, after the lease had expired, was bad, for not stating that the distress was made within six calendar months after the determination of the lease, according to the statute 3 Anne, ch. 14; and that a plea of a distress for rent, on a demise of a house and other premises to A. at a certain rent, and that the plaintiff occupied the house with A. during A.'s lifetime, and after his death continued as the defendant's tenant of the house, and that the defendant distrained for the rent of the house and other premises on the plaintiff's goods in the house, was held also bad, as the plaintiff, under the demise to him, was liable for the rent of the house only after A.'s death, and could not be distrained on for the rent due for the entire premises demised to A. *Strathy v. Crooks*, Mich. Term, 7 Vic.

New assignment to justification.]
 —25. The effect of a new assignment where but one trespass has been complained of. Plaintiff must not in his replication amplify the cause of action for which he has declared, nor can he in his replication deny the justification wholly and at the same time reply excess. *Spalding v. Rogers et al.*, i. U. C. R. 135.

Trespass q. c. f.—Plea, restoration of plaintiff under Statutes of Forcible Entry &c.]—26. In trespass quare clausum fregit the defendant pleaded that the plaintiff made his complaint to the justices of the peace of a forcible entry and detainer under the statutes, and the justices summoned a jury and heard the complaint, and made a warrant for restoring the plaintiff to his possession, and that this was the same trespass as that complained of by the plaintiff. The plea was held bad on general demurrer. *Boulton v. Fitzgerald*, i. U. C. R. 343.

Trespass for taking cattle—Plea, not possessed.]—27. Where in trespass for taking the plaintiff's cattle, the defendant pleaded not possessed, and on the trial it was proved that the cattle had belonged to the defendant, and that the plaintiff had leased them with a farm from the defendant, but had detained them after the term had expired, for which the defendant had sued him and recovered damages to the value of the cattle after this action was brought: *Held*, that the plaintiff could not treat this verdict as giving him a title to the cattle, by relation back, at the time this action was commenced, but that this defendant was entitled to succeed on his plea of not possessed. *Abrams v. Moon*, i. U. C. R. 552.

Trespass for taking wheat—Plea, leave and license—Evidence.]—28. Trespass to south parts of lots Nos. 14 and 15, laying an asportavit and conversion of a quantity of wheat and straw of the plaintiff.—Plea, leave and

license generally. In support of this plea, the defendants proved a deed made by the plaintiff, 20th February 1846, whereby in consideration of 28*l.* acknowledged to have been received from the defendant Turner, he "bargained and sold" to him, among other things specified, "all and singular twenty acres of wheat then growing and being on the south part of lot 14 in the third concession of Brantford, and in the possession and occupation of the grantor Lunn, to hold the said twenty acres of wheat to him the said Turner, his heirs, executors, administrators and assigns forever, without any claim or hinderance of any person whomsoever, and without any account to be thereafter rendered, so that neither the said Lunn, nor any one in his name, should claim or demand any right or interest in the said twenty acres of wheat, or any part thereof, or at any time thereafter, but shall from all actions and demands therefor be wholly debarred and excluded," and by the same instrument the said Lunn the plaintiff, bargained and sold "all the said twenty acres of wheat, with the right of ingress, egress and regress into, upon and from the said lot No. 14, to protect, harvest and remove the said twenty acres of wheat at the option and discretion of him the said Turner, his executors &c., unto him the said Turner, his executors &c., against all and every other person or persons, shall and will warrant, and forever defend." Then followed a proviso that if Lunn should pay to Turner 28*l.* with interest, on a day named, (20th June 1846), then the deed should be void. Lunn on his part covenanted to pay the money, and it was stipulated, until default made, Lunn might enjoy and retain in his possession and use the goods and premises above bargained and mortgaged as aforesaid, unless he should at any time before the day of payment be sued or prosecuted by any other person whatever, in which case Turner was to be allowed to take and enjoy the

said goods and chattels as of his own property. *Held*, that the defendants must fail under their general plea of leave and license, the deed giving no right of entry on lot 15, a trespass that had not been denied, no general issue being pleaded. *Semble*, that if they could have derived from their license to enter on lot 14 a right to enter on lot 15 as being necessary, in order to enable them to enjoy the privilege granted with respect to lot 14, they should have in a special plea set forth the necessity. *Held also*, that the defendants must fail upon their plea of license, as the license conveyed by the deed was not to enter and take away the plaintiff's wheat, but to enter for the purpose of taking the defendants' wheat, which the plaintiff had assigned to them, and which was growing on the plaintiff's land. *Semble also*, plea bad, as the license proved was conditional and not absolute. There should have been a special plea shewing default in payment of the money by plaintiff on the day named. *Semble*, that the only right the deed gave the defendants, was to cut and carry away the wheat of the plaintiff; the defendants had no right to enter on the plaintiff's land and take the wheat away by force after it had been cut and stacked by plaintiff. *Lunn v. Turner et al.*, iv. U. C. R. 282.

Trespass q. c. f.—Plea, close not plaintiff's—Evidence.]—29. To support an action of trespass upon the plea of the close not being the close of the plaintiff, the plaintiff must prove an actual and immediate occupation of the locus in quo. *McNeil v. Train*, v. U. C. R. 91.

Possession, a question for the jury.]—30. Under the plea of the close not being the close of the plaintiff, the question of possession is a fact for the jury. *Ib.*

Occupation of land without title strictly confined to such occupation.]—31. Where there is no actual title

or claim of title, the occupant is not deemed by construction of law to be in possession of more land than his occupation covers, and to this occupation when suing in trespass he will be strictly limited. *Lake v. Briley*, v. U. C. R. 136.

Admissibility of an award under the pleas given.]—32. To an action of trespass the defendant pleaded, 1st, not guilty; 2nd, close not plaintiff's; 3rd, plaintiff not possessed: *Held*, that an award could not be given in evidence by the defendant under any of these pleas. *Ib.*

TRIAL AT BAR.

The Court will not grant a trial at bar merely because the party applying for it is a barrister. *Doe dem. Palmer v. Dickson*, Trin. Term, 11 Geo. IV.

TRIAL AT NISI PRIUS.

See cases referred to under NISI PRIUS (PROCEEDINGS AT).

TRIAL (WRIT OF).

See WRITS OF TRIAL ETC.

TROVER.

- I. WHEN AND BY WHOM MAINTAINABLE.
- II. PLEADING, EVIDENCE, AND DAMAGES.

- I. WHEN AND BY WHOM MAINTAINABLE.

See DEMURRAGE, 2.—FIXTURES, 3. MAGISTRATES, 10.—NEW TRIAL, X. 10.—PARTNERS ETC, 8.—RIDEAU CANAL, 3.—TENANCY IN COMMON, 1.

Bond.]—1. Trover may be maintained against the obligor of a bond

who has wrongfully torn off his seal. *Bank of Upper Canada v. Widmer*, ii. O. S. 222.

Deed in fee.—2. Trover may be brought for a deed passing a fee simple. *Burr v. Munro*, Mich. Term, 3 Vic.

Title deeds.—3. Trover as well as detinue may be maintained for leases or other title deeds. *Anderson v. Hamilton*, iv. U. C. R. 372.

Notice by owner at sale dispenses with demand.—4. It seems that where a party purchases the goods of another at public sale, a notice given by the owner at such sale dispenses with the necessity of a demand and refusal to maintain trover. *Haren v. Lyon*, Tay. U. C. R. 510.

Against an agent selling horses at less than fixed price.—5. Where the defendant received two horses from the plaintiff to sell at a certain price, and without his assent or authority sold them at a less price: *Held*, that he was liable in trover for the difference. *Priestman v. Kendrick et al.*, iii. O. S. 66.

Trover by a person whose goods have been wrongfully seized and sold.—6. A joint action of trover may be maintained against the purchaser of goods at sheriff's sale and the attorney for the plaintiff, by a person whose goods have been illegally taken and sold as the property of the execution debtor. *Kerby v. Cahill et al.*, Easter Term, 7 Vic.

Trover by tenant against mortgagee for shelves &c.—7. The tenant of a mortgagor holding under a lease for years, during the continuance of his term attorned to the mortgagees, and after the term had expired continued to hold the premises from the mortgagees as a yearly tenant, and when his tenancy ceased claimed from them certain shelves and boxes with which he had fitted up a shop on the premises during the continuance of his lease from the mortgagor, and which

were not fixtures, and for which, upon the mortgagees refusal to part with their possession, he brought trover: *Held*, that the action was maintainable. *Denholm v. The Commercial Bank*, M. D., i. U. C. R. 369.

[See case 13, *infra*.]

Donatio mortis causa—Delivery—Trover for goods so given.—8. A. makes an agreement with B. to work a mill on shares—A. who owned the mill, to have two-thirds, and B. who worked it, one-third of the toll. After some years B. is taken dangerously ill and about an hour before his death sends for A. and tells him (having first requested those about him to leave the room) that there are about 300 bushels of toll wheat in the mill undivided, 100 of which under the agreement would be his, (B.'s): that as he (B.), owed him (A.), for money lent, he begged he would accept the other 100 bushels, and also a promissory note which he sent for and handed him. Witnesses who overheard part of the conversation swore to the 100 bushels and the note being given by B., not as a gift, but as they heard B. say, in payment of a debt. *Held*, in an action of trover brought by B.'s administratrix to recover from A. the wheat and note, that upon these facts the question of delivery as upon a donatio mortis causa did not arise, the transaction being nothing more than an ordinary sale for a valuable consideration; that if it had, the wheat being already in A.'s own mill, no further delivery could be required. *Held also*, that the agreement being personal between A. and B., the intestate having no term in the mill, his administratrix had no right of possession and could not support the action. *Ralph v. Link*, v. U. C. R. 145.

Conversion—Sufficiency of demand and refusal.—9. Where a demand in trover is necessary to prove a conversion, if it be verbal, the answer must be positive; and where a verbal

demand was made on the defendant while driving at a distance from his house where the property demanded was, and no answer was returned: *Held*, no evidence of a conversion. *McLellan v. Graham*, Easter Term, 2 Vic.

10. Where A. lent a horse to B., in whose possession he was injured and notice immediately given to A., who refused to receive him from an inn where he had been left by B., and afterwards made a formal demand of him from B. *Held*, that the non-delivery in compliance with that demand, the horse not having been at the time in B.'s possession, was no evidence of conversion. *Wells v. Crew*, Trin. Term, 6 & 7 Wm. IV.

Evidence of tortious possession and conversion.]—11. *Quære*: Is the evidence of the secretary of the province that it appears, by an entry in his own hand-writing in a book kept for such entries, that a crown grant was given to A., and that he therefore was convinced that it had been delivered to A., sufficient to charge A. in trover with the possession of such crown grant, and if A. obtained such crown grant without any direction or authority from the grantee, but from the direction of some public officer to the secretary to deliver to A. such grants as he should require, was possession obtained under such order tortious, and did it afford evidence of a conversion at that time? *Hampson v. Boulton*, Hil. Term, 6 Wm. IV.

Conversion—Sufficiency of demand and refusal.]—12. Where the solicitor of the plaintiff went to the Bank of Upper Canada and demanded from the president of the bank certain boats, and the president told him he had no answer to give, and referred him to the solicitor of the bank, to whom he went, and was told by him that he was not authorised to give any answer: *Held*, that upon these facts sufficient evidence was given of a demand and refusal to

support an action of trover. *McDonell et al. v. The Bank of Upper Canada*, vii. U. C. R. 252.

When maintainable for fixtures.]—13. Trover cannot be maintained for a fixture so long as it remains annexed to the freehold. *Oates v. Cameron*, vii. U. C. R. 228.

II. PLEADINGS, EVIDENCE, AND DAMAGES.

See DE INJURIA, 7, 8.—NEW TRIAL, II., 7, 17.—PLEADING, VIII. 5.

Plea, not possessed—Averment of time necessary.]—1. To an action of trover the defendant pleads that the plaintiffs "were not lawfully possessed of the goods and chattels &c. as of their own property, as in the second count alleged." Demurrer to plea. *Held*, plea bad, in not shewing *at what time* the defendant means to allege the plaintiffs were not possessed; the words "at the said time when &c." should have been added. *Cuvillier et al. v. Brown*, iii. U. C. R. 353.

Defence of property being purchased by defendant should be specially pleaded.]—2. Where in trover the defence is that the property alleged to have been converted was purchased from the plaintiff by the defendant, it should be specially pleaded. *Gunn v. Gillespie*, ii. U. C. R. 124.

Pleadings—Admissibility of evidence.]—3. In an action of trover by the assignee of a bankrupt against the defendant, the declaration laid the trover and conversion before the bankruptcy. The defendant, after pleading the general issue, justified under a judgment and execution against the bankrupt. The plaintiff replied that the judgment and execution were void under the bankrupt laws. The defendant demurred, and the court decided the replication to be well pleaded. It was therefore held, that as the general issue was the only issue on the record

at the trial, and as that issue merely went to the fact of conversion, the defendant could not, in the absence of a special plea, be let into a justification under his execution. *Brent v. Perry*, vii. U. C. R. 24.

Trover for an away-going crop—Evidence.]—4. In trover for wheat reaped and claimed by the defendants as of right belonging to them, as an away-going crop after the expiration of a lease for seven years, the plaintiff's witnesses proved a new lease in writing of the same premises to a third party, from the expiration of the defendants' lease, but the new tenant swore that he had no right to the crop: *Held*, that it was not necessary for the plaintiff to produce the new lease. *Burrows v. Cairns et al.* ii. U. C. R. 288.

General rule in estimating damages.]—5. In trover the principle of law (though not an inflexible one) is, that the jury can give no more in damages than the value of the goods at the time of the conversion. Where therefore logs had been taken to the defendant's mill and sawed there, and the plaintiffs, acting under a supposed claim of right, refused to deliver them to the defendant: *Held*, that the plaintiffs were not entitled to the value of the logs in the state of sawed lumber, or to expense incurred in sending a steamer and barges for the lumber. *Morton et al. v. McDowell*, vii. U. C. R. 338.

Trover against obligor who has torn off his seal—Damages.]—6. In trover against an obligor who has wrongfully torn off his seal, damages may be recovered to the amount of the penalty. *Bank of Upper Canada v. Widmer*, ii. O. S. 222.

Trover for a deed in fee—Damages.]—7. In trover for a deed passing a fee simple, the jury may give the full value of the land as the amount of damages. *Burr v. Munro*, Mich. Term, 3 Vic.

Agreement to build a house, bricks to be made on defendant's land—Defendant seizes the bricks—Trover

therefor—Damages.]—8. Where the plaintiff agreed to build a house for the defendant, who paid a certain sum in advance, and gave the plaintiff permission to make the bricks of which the house was to be built on his land and to sell any surplus, and, the plaintiff not proceeding with the building, the defendant seized some bricks which the plaintiff had made and a number of articles belonging to the plaintiff: *Held*, on trover brought by the plaintiff for the value of the bricks and the other articles, that no damages could be recovered for the seizure of the bricks, as, under the agreement, they were the property of the defendant; and, the jury having estimated their value in the damages, a rule was made absolute to reduce the verdict. *Wilcox v. Burnside*, iv. O. S. 288.

TRUST AND TRUSTEE.

See ALIEN, 1.—BILLS OF EXCHANGE, ETC., IV. 1, 7.—ESTATE, 11.—EXECUTION, 17, 21.—JOINT TENANCY, 1.—MIDLAND DISTRICT TURNPIKE TRUST—RELIGIOUS SOCIETIES.

Disclaimer by executor—Its effect upon trusteeship.]—1. A disclaimer by an executor who is also a trustee under the will, does not divest him of his estate as trustee. *Doe dem. Boyer v. Claus*, iii. O. S. 146.

2. A release by an executor who is also a trustee does not release trustee. *Doe dem. Berringer v. Hiscott*, Mich. Term, 3 Vic.

Several trustees—Incapacity of one—Vesting of estate.]—3. Where lands are devised to A., B. and C. as trustees, and C. is incapable of taking the estate, may nevertheless vest in A. and B. *Doe dem. Vancott v. Read*, iii. U. C. R. 244.

TUITION.

See KING'S COLLEGE.

TURNPIKE TRUST.

See HIGHWAY—MIDLAND DISTRICT TURNPIKE TRUST.—PRINCIPAL AND AGENT, 1.—TOLLS.—WITNESS, 20

Proceedings will not be quashed merely on the ground of informality.]—Where proceedings have been taken and damages awarded under the provincial act 4 & 5 Vic. ch. 63, and a mandamus issued enjoining payment of the damages awarded, the Court will not order the proceedings shewn on the return to a writ of certiorari to be quashed on the ground of mere informality. To set them aside, the Court must see that substantial justice between the parties has not been done. *Regina ex rel. Denison v. The Home District Turnpike Trust, In re*, i. U. C. R. 193.

UMPIRE.

See ARBITRATION AND AWARD, VIII. 8.

UNITED STATES.

See ABSCONDING DEBTOR, 8.—ARREST, I. 19.—COSTS, I(2), 6.

UPPER CANADA COLLEGE.

See KING'S COLLEGE.

USE AND OCCUPATION.

See ARREST, I. 2.—ARREST OF JUDGMENT, 1.—PLEADING, II. 2.

Action—Defence of forfeiture of plaintiff's estate.]—1. It is no defence to an action for use and occupation, that the plaintiff is himself the lessee of the premises under a lease in which there is a covenant that the lessor shall be allowed to re-enter if the lease be assigned, or the premises sublet without the lessor's license, and

that the plaintiff demised the premises to the defendant without the license of the lessor, there being no averment that the plaintiff's lessor had taken any advantage of the forfeiture. *Henderson v. Torrance*, ii. U. C. R. 402.

Lease produced—Evidence of identity of premises.]—2. Where in an action for use and occupation, the plaintiff proved his case by evidence of admissions of the defendant, who on his defence put in a lease under seal from the plaintiff, which he contended was for the same premises, but there was no distinct evidence of identity, and the jury found for the plaintiff, the Court afterwards, on affidavits shewing that these were the only premises demised by the plaintiff to the defendant, made a rule absolute for a new trial without costs, unless the plaintiff would elect to enter his judgment for the amount of his verdict only. *Boulton v. Defries*, ii. U. C. R. 432.

Proof of legal title in plaintiff and mere possession by defendant.]—3. In an action for use and occupation, the plaintiff proving a legal title to the premises, and a mere naked possession by the defendant, is entitled to a verdict. He need not go further and prove an attornment or contract between himself and the defendant. *Price v. Lloyd*, iii. U. C. R. 120.

Nonsuit, when occupation is under a third party.]—4. In an action for use and occupation where it is quite evident that the defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third party, the plaintiff will be nonsuited. *McDonald v. Brennan*, v. U. C. R. 599.

USES AND TRUSTS.

As to the distinction between a "trust" and a "use"—See *Gamble et al. v. Rees*, vi. U. C. R. 397.

USURY.

See AMENDMENT, II. 23.—BILLS OF EXCHANGE ETC., VI. 5; VIII. 1.—MONEY HAD AND RECEIVED, 5.—MORTGAGE, 10.—NEW TRIAL, X. 15.—WITNESS, 8, 9.

Promissory notes bearing interest before their date.—1. Notes given bearing interest from a period antecedent to their date, are not usurious on that account, where it appears that the debt for which such notes were given was due at the time from which interest is computed. *Gates et al. v. Crooks*, Dra. Rep. 459.

Mortgage securing an usurious debt.—2. Where A. having purchased land at sheriff's sale for 82*l.*, and not being able at the time to pay for it, applied for a loan of the money to B., who was an attorney and had claims in his hands against the person for whose debts the land was sold, and B. agreed to advance it on A.'s repaying 13*l.* 2*s.* in three days; and A. having received a deed of the land from the sheriff, conveyed it to B., subject to redemption on payment of 13*l.* 2*s.*, and B. transmitted the bonus on the loan, 50*l.* to his client, as so much received on his claims: *Held*, to be usury in B. *McDonnell qui tam. v. Kirkpatrick*, iii. O. S. 324.

Promissory note arising out of usury.—3. Where in an action against the makers of a promissory note for 61*l.* 5*s.* 0*d.* it was proved that A. had an execution against the property of the defendants, and that the plaintiff had a note made by A. for the same amount as the execution, viz., about 51*l.*, and the defendants obtained the note from the plaintiff, hoping by that means to stop A.'s execution, and gave the plaintiff their note, the subject of this action, for 61*l.* 5*s.*, payable one year after date with interest: *Held*, in the absence of any further proof, that the note was void for usury. *Doran v. Bush et al.*, Mich. Term, 6 Vic.

Usurious cognovit—Judgment assigned with notice—Stay of proceedings.—4. Where a plaintiff had been guilty of gross usury in taking a confession of judgment from the defendant, the Court stayed proceedings on an execution issued on the judgment on payment of the true debt and interest, although the judgment had been assigned, the assignee having had notice of the usury complained of before he took the assignment. *Knapp v. Forrest*, Mich. Term, 7 Vic.

Promissory note—Plea of usurious forbearance—Days of grace.—5. Where in a plea of usury to an action on a promissory note, the defendant stated the usurious lending and averred that it was on a promise to forbear for twelve months from 28th October 1842, until 28th October 1843, and that the note was given payable in twelve months to secure the payment, and the plaintiff demurred, because the note was not due, including the three days of grace, until the 31st of October, and therefore the contract was erroneously stated—the Court held the plea sufficient, as the three days of grace were the act of the law, and not a part of the contract of the parties. *McCrae v. Reynolds*, i. U. C. R. 36.

Qui tam action—Nonsuit for non-production of necessary evidence—Discovery thereof after trial.—6. Where in a qui tam action for usury, the plaintiff was nonsuited for not producing certain promissory notes in the negotiation of which the usury had taken place, the only evidence offered to account for their non-production having been a letter that they were not to be found in the office of the judge's clerk, where it was sworn they had been filed—the Court refused to set aside the nonsuit upon affidavit that they had been found since the trial. *Root qui tam v. Woodward*, i. U. C. R. 311.

Qui tam action—Variance between statements and proof.—7. In a qui

action for usury any variance between the statement of the time of the forbearance laid in the declaration and the time proved is fatal. *Fraser qui tam v. Thompson*, i. U. C. R. 314.

Construction of 51 Geo. III. ch. 9, sec. 6—"or" for "and."]—8. Although by the words of the provincial statute 51 Geo. III. ch. 9, sec. 6 against usury contracts, bonds &c., are declared void only when usurious interest is reserved *and* taken, yet the Court will construe "*and*" to be "*or*," particularly as the statute 7 Wm. IV. ch. 5, sec. 3, declares in the preamble "that by law all contracts and assurances whatever for payment of money made for an usurious consideration are utterly void;" and therefore a plea to an action on a promissory note, that the note was given to secure a debt and was for an usurious consideration for forbearance, was held good, although it did not state that the usurious interest was paid or received. *Boag v. Lewis et al.*, i. U. C. R. 357.

All securities in furtherance, void.]—9. By the usury laws, all securities which may have been given in *furtherance* of an usurious transaction, with the knowledge of the person who took the security, are void. *Armstrong v. Somerville*, iii. U. C. R. 472.

Note, indorsed over for an antecedent debt, not protected.]—10. A bona fide holder, without notice, who takes a bill of exchange or note in payment of an *antecedent* debt, and not upon a new consideration given at the time by discount or otherwise, is not protected against the offence of usury by our provincial act 7 Wm. IV. ch. 5, sec. 3. There is no distinction in this respect between the effect of our act and of the British act 58 Geo. III. ch. 93. *Geddes v. Culver et al.*, iii. U. C. R. 162.

Lumbering trade—Usurious advances.]—11. An agreement that A. and B. should allow C. and D. (lumberers upon the Ottawa) in addition to legal

interest, a further sum of four per cent. upon all moneys advanced, for the purpose of getting out timber, is usurious and void. *Bryson et al. v. Clandinan*, vii. U. C. R. 198.

Lumber taken absolutely, and not as security for such advances.]—12. If C. and D., instead of being mortgagees, holding the timber merely as security for moneys advanced under such an usurious agreement, had taken the timber absolutely in payment of their account for advances, then, although their account might have included usurious interest, the property, after it had so become theirs, could not have been divested on that ground. *Id.*

VARIANCE.

See AMENDMENT, II. *passim*.—ARRESTATION AND AWARD, VI. (2), 16, 19.—BAIL, II. 4.—BILLS OF EXCHANGE, ETC., V. 5.—ESCAPE, 3.—GUARANTEE, 6.—LIBEL AND SLANDER, III. (1), 1, 2, 4.—LIMITS, II. 3, 8.—MALICIOUS PROSECUTION, 2.—MISNOMER.—PARLIAMENT, 6. REPLEVIN, ETC., 4.—TRESPASS, II. 4.—USURY, 7.—VERDICT, 8, 9.

Declaration on a penal bill—Production of a bond.]—1. Where the plaintiff declared upon a penal bill, and gave in evidence a bond with a condition, held not a sufficient variance to set aside a verdict. It should, at least, have been taken advantage of by special demurrer upon oyer.—*De Riviere et al. v. Grant*, Tay. U. C. R. 652.

Between submission set out and that recited by the award.]—2. In an action on an award, with the common counts, the submission to arbitration, as set out in the declaration, mentioned *three* defendants, and the award, in reciting that submission, only noticed *two*, but referred to the rule by which the submission was made as annexed to the award, in which rule the three defendants were named. *Held*, that the

variance between the submission set out in the declaration and that recited in the award was immaterial, as the submission itself agreed with the declaration. *Hale v. Mathieson*, Dra. Rep. 66.

In statement of libel.]—3. Immaterial averments need not be proved, and variances in the statement of a libel, not altering the sense of the part truly set out, are immaterial. *Hamilton v. Burwell*, ii. O. S. 305.

Action for mesne profits—Variance in statement of the judgment.]—4. In trespass for mesne profits of close of husband and wife, and proof of judgment recovered in ejectment on the demise of the wife alone, held a fatal variance. *Ashton et ux. v. Keezar*, Mich. Term, 7 Wm. IV.

Trespass against a bailiff—Variance in statement of warrant.]—5. Where in trespass for taking goods the defendant pleaded a justification as a sheriff's bailiff, under a warrant directed to him to make of the defendant's goods a sum recovered for costs in case, and the warrant produced was for damages and costs in assumpsit: Held, a fatal variance. *Boyle v. Garner et al.*, Trin. Term, 3 & 4 Vic.

Action against sheriff's sureties—Variance in statement of writ]—6. Where, in covenant against a sheriff's surety, the plaintiff, in assigning a breach, set out a judgment recovered at the suit of the plaintiff on "a promise and undertaking," and a writ of fieri facias issued thereon, to which the sheriff had made a false return, and the defendant pleaded that no writ of fieri facias had issued on the judgment, to which the plaintiff replied, setting out a fieri facias, which he alleged had issued on that judgment, but which recited a recovery on "promises and undertakings," and the defendant demurred specially for the variance: Held, that the replication was sufficient in this action, and that as the sheriff could not have made the variance a

defence after having acted upon the writ, his surety could not. *Roy v. Hamilton*, Hil. Term, 4 Vic.

In statement of a judgment recovered.]—7. The defendant pleaded a set off of a judgment recovered in debt on bond for 223*l.* 15*s.* 3*d.*, being 200*l.* debt, 1*s.* damages, and 23*l.* 14*s.* 3*d.* costs. To this plea the plaintiff replied nul tiel record, and on the production of the judgment it appeared that the postea was for the recovery of the debt, damages and costs, and also 55*l.* 15*s.* for damages assessed on account of breaches of the bond: Held, no variance, and that the plaintiff was entitled to judgment. *Bowerman v. Brown*, ii. U. C. R. 409.

In statement of a deed—How taken advantage of.]—8. When a plaintiff, declaring upon a deed, sets it out untruly, but in a particular not material to the action which has been brought upon the deed, the defendant, wishing to take advantage of the variance, should plead non est factum; he cannot crave oyer and demur. *Boulton et al. v. Weller*, iii. U. C. R. 372.

Misnomer—How to be taken advantage of.]—9. The several members of a firm being sued as indorsers of a promissory note, one of them, by mistake, was called Charles Jones, his christian name being William: Held, that the variance could occasion no difficulty on the trial, the only question being as to the identity of the party. The defendants, if they desired to take an exception, should have moved under the statute 7 Wm. IV. ch. 3, to compel the plaintiff to amend his declaration. *Ketchum v. Jones et al.*, v. U. C. R. 460.

In statement of a ca. sa.]—10. An al. test. ca. sa. is still a ca. sa.; and therefore when a defendant justified under the alias and the plaintiff replied that the said writ had been set aside, and then proved a rule of court discharging the arrest under a ca. sa.:

Held, no variance. *Robertson v. Meyers*, vii. U. C. R. 423.

In statement of a recognizance of bail.—11. Variance between a recognizance of bail, entered into in a foreign country, as stated in the declaration and proved at the trial. See *Short v. Kingsmill et al.*, vii. U. C. R. 350.

In statement of former action.—12. When, to action brought by plaintiffs on the common counts, the defendant pleaded a prior suit between the same parties for the same identical cause of action, and prayed an inspection of the record, and it appeared, on inspection, that the plaintiff's name in the former suit was James W. Whyte, and in the second James M. Whyte: *Held*, a fatal variance. *Whyte et al. v. Cameron*, vii. U. C. R. 378.

13. *Quære.*—How far the declaration in the two suits, varying as to the number and nature of the common counts and the amount claimed, would be considered fatal? *Ib.*

In statement of a bond.—14. The plaintiffs, by the name of the *Council of the District of Brock*, declared in debt on bond: the declaration stated that the defendants acknowledged themselves to be held and firmly bound to the said plaintiffs; the bond, when produced at the trial, was found to be given to the "*Municipal Council of the Brock District*;" the bond was not set out on oyer: *Held*, that this variance was not fatal. *Brock District Council v. Bowen et al.*, vii. U. C. R. 471.

Bond with condition—Declaration on bond merely.—15. The plaintiffs, who had taken from the defendants a bond for the due performance of a collector of rates' duty with a condition in it, prescribed by certain municipal by-laws, declared upon this bond as upon a common money bond, without setting out the condition; the defendants pleaded non est factum: *Held*, that upon this plea, the condition being only a defeazance and not a part of the

bond, as set out without the condition, was a valid bond; that there was no fatal variance, and that the plaintiffs were entitled to recover. It would have been better, however, for the plaintiffs to have set out the condition in their declaration, and to have assigned breaches. *Ib.*

In statement of a bill of exchange.—16. Where a bill had been so declared upon as not to shew it to have been a foreign bill, and when produced at the trial it appeared to be a foreign bill drawn in Toronto on a party in New York: *Held*, that this was not a variance upon which a nonsuit could be granted. *Boyes v. Joseph*, vii. U. C. R. 505.

VENDITIONI EXPONAS.

See EXECUTION, 8.—SHERIFF, II. 9.

Teste and return, when against lands.—1. A writ of venditioni exponas against lands and tenements, having but a few days between the teste and return, is irregular, although the exigencies required by the provincial statutes respecting the teste, delivery and return of the fi. fa. upon which it was grounded may have been complied with. *Armour et al. v. Jackson*, Tay. U. C. R. 146.

2. It is no defect in a writ of venditioni exponas against lands that it has not three months between its teste and return. *Landrum v. McMartin*, i. U. C. R. 394.

[See 2 Geo. IV. ch. 1, sec. 20.]

3. It is not necessary under the statute 43 Geo. III. ch. 1, that there should be a year between the teste and return of a writ of venditioni exponas against lands. *Doe dem. Dissett v. McLeod*, iii. U. C. R. 297.

Ven. ex. authorises a sale though return-day be past.—4. Where a levy is made by the sheriff under a writ of fieri facas and he returns goods on hand for want of buyers, and a writ

of venditioni exponas is then sent to the sheriff, that writ will always be an authority to the sheriff to sell, though the return-day be past. *The Bank of Upper Canada v. McFarlane et al.*, iv. U. C. R. 396.

Improper return — Remedy.]—5. *Semble*: That where a sheriff, under the above circumstances, returns to the writ of ven. ex. that "he is unable to sell," he may be liable to an action for false return, but he cannot be attached. *Ib.*

Entry, seizure and sale under, not justifiable.—6. Neither a sheriff nor his deputy can justify an entry, seizure and sale of a defendant's goods under a writ of venditioni exponas. *Stull v. McLeod*, Trin. Term, 3 & 4 Vic.

VENDOR AND PURCHASER.

See TITLE, and the references there made.

VENIRE (AWARD OF).

See RECORD (NISI PRIUS), 5, 6.

VENIRE DE NOVO.

1. When there is a special count and common count in the declaration, the effect of the special count being bad when special damages have been assessed is, that there must be a venire de novo, unless it can be said that the verdict was given wholly upon evidence applicable to the common count alone, and not to the special count. *Dodge v. Muir*, vii. U. C. R. 526.

2. Trespass for breaking and entering the plaintiff's car-house, and for seizing and taking rail-cars, &c. Pleas—1st. Not guilty; 2ndly. Plaintiff not possessed of car-house; 3rdly. The car-house was the freehold of A., and the defendant, as his servant, &c. broke and entered the car-house, and

committed the said supposed trespasses in the declaration mentioned; 4thly. As to seizing &c. the cars and converting them, &c., that they were not the plaintiff's. The jury gave a verdict for the plaintiff on all the pleas but *the third*, and that they found for the defendant. No damages were given to the plaintiff, the third plea being taken to bar the action: *Held*, on motion for a new trial, that as the third plea left unanswered the taking of the rail-cars, the plaintiff should have a verdict for nominal damages, and that a venire de novo must be ordered, unless the defendant would consent to such a verdict being entered. *Maclem et al v. McMicking*, iv. U. C. R. 264.

VENIRE FACIAS.

See JURY, 3, 10.—JURY PROCESS—RECORD (NISI PRIUS), 9.

VENUE.

See CONSTABLE, 1, 3.—INFORMATION, 5.

Action on bond—Changing venue.]

—1. The Court will not change the venue in an action upon a bond conditioned for the performance of an award without special grounds. *Losing v. Horned*, Tay. U. C. R. 103.

[*So Martin v. Davis*, xi. M. & W. 734.]

Issue of writ in one district, venue in another.]

—2. The venue cannot be laid in the district of A. an outer district, or in the Home district, when the writ has been issued in the district of B., also an outer district. *Crawford v. Ritchie*, Tay. U. C. R. 104.

Amendment.]

—3. The venue being laid as in the last case, the plaintiff was allowed to amend. *Ib.*

Action against sheriff—Sheriff unable to attend.]

—4. The Court will not change the venue where a sheriff is defendant, on the ground that he cannot attend at the trial. *Brock v. McLean*, Tay. U. C. R. 312.

Mere service of order for changing, insufficient.]—5. A venue is not changed by a judge's order and service alone. *MP Nair v. Sheldon*, Tay. U. C. R. 598.

[Also see case 10. infra.]

Change, at the instance of plaintiff after issue joined.]—6. The Court will not change the venue on the application of the plaintiff after issue joined, unless a very special ground be laid for it. *Crooks v. House*, iii. O. S. 308.

[See a history of the practice as to change of venue fully entered into and explained in *Attorney General v. Churchill*, viii. M. & W. 171.]

Action on bail bond by assignee of sheriff—Venue.]—7. Declaration by assignee of sheriff on a bail bond.—Venue in the margin in the Home district.—Assignment of the bond stated in the declaration to be at S. in the Western district, without laying any venue for this act in the Home district: *Held* bad on special demurrer. *Beal et al. v. Field et al.*, iii. O. S. 236.

Action against carriers—Affidavit for change.]—8. In an action on the case against carriers the venue cannot be changed on the common affidavit. *Ham v. McPherson et al.*, Mich. Term, 5 Vic., P. C. Jones, J.

Bringing back, at the instance of plaintiff.]—9. After the venue has been changed at the instance of the defendant, the Court will not, unless under very special circumstances, allow the plaintiff to amend his declaration so as to bring it back to the district where it was originally laid. *Smith v. Cotton*, i U. C. R. 397.

[Proper persons to make affidavit in this case.—See *Williams v. Higgs*, vi. M. & W. 133.]

If order granted the alteration must in fact be made.]—10. Though an order to change the venue has been granted and served, unless the venue be in fact changed by taking out the rule and making the alteration in the

record, the plaintiff is at liberty to proceed to trial according to the original venue. *Hornby v. Hornby*, iii. U. C. R. 274.

Local action—How cause may be tried in another district.]—11. In a local action it is irregular for the plaintiff, if he desire to try the cause in another district, to obtain an order to change the venue. The application should be to enter a suggestion on the roll to try the cause in another district. *Doe dem. Crooks v. Cumming*, iii. U. C. R. 65.

VERDICT.

See ACTION, 6.—AMENDMENT, III. passion—IRREGULARITY, 4.—JUDGMENT, 21 et seq.—NEW TRIAL, X. 13, 16, 24.—NONSUIT, 11.—NOTICE OF TRIAL, 8.—RECORD (NISI PRIUS), 8 et seq.—TRESPASS, II. 9.

Fraud.]—1. Fraud cannot be presumed, contrary to a verdict. *Haren v. Lyon*, Tay. U. C. R. 510.

Several counts—Effect of abandonment of all but one.]—2. If a plaintiff at a trial abandon all the counts in his declaration but one, on which he obtains a verdict, the defendant is not entitled to a verdict on the other counts. *Gates v. Crooks*, Dra. Rep. 189.

Entering verdict on one count, abandoning the rest.]—3. Where in an action on 32 Hen. VIII. ch. 9, a verdict was taken upon four counts of the declaration for the plaintiff, and the defendant moved to arrest the judgment on the ground that some of the counts were bad, the Court allowed the plaintiff to enter the verdict upon one count of the declaration, abandoning the rest. *Beasley qui tam v. Cahill*, ii. U. C. R. 320.

Several issues—Failure on one—General verdict on another.]—4. A defendant in an action of trespass failing to prove the surrender of a term of years from the plaintiff to himself

upon an issue arising out of a plea of liberum tenementum, may nevertheless consistently hold a general verdict upon another issue denying the close to be the close of the plaintiff. *McNeil v. Train*, v. U. C. R. 91.

Several issues—General verdict—Objection that defendant entitled to some.]—5. Where there are several issues raised, and the plaintiff has a verdict upon the whole record, it forms no good objection to his recovery that some of the issues should have been found for the defendant, if there be sufficient without them to support the verdict and they be material. *Rowland v. Tyler*, iv. O. S. 257.

Several issues—General verdict not disposing of such issues.]—6. Where there are several issues in a cause and the jury find a general verdict for the plaintiffs, which does not dispose of the specific issues raised, the Court will grant a new trial. *McMartin v. Graham et al.*, ii. U. C. R. 365.

Entering verdict on different count from one succeeded upon at the trial.]—7. *Semble*: That a party may apply his verdict to a different count from that on which he elected to take it at the trial, where the evidence given will support such count. *Ponton v. Moody*, vii. U. C. R. 301.

Action on note for 40l.—Production of one for 42l.—Verdict.]—8. Where on an assessment of damages on a promissory note stated in the declaration to be for 40l., a note for 42l. was produced in evidence, an amendment of the record to correspond with the proof was refused, but the Court allowed a verdict to be entered for the amount of the note set out in the pleadings, on the note being filed as the note on which the action was brought. *Bank Upper Canada v. Crawford*, Trin. Term, 5 & 6 Wm. IV.

Trespass—Description of close—Case disproved—Nonsuit.]—9. Where in trespass quare clausum fregit it appeared that the only injury complained

of, and the only one in evidence before the jury, was the destruction in part of a mill over the waters of a river, and not on the land included in the description of premises in the declaration: *Held*, that the verdict found for the plaintiff was incorrect, and a nonsuit was entered. *Canniffe v. Canniffe et al.*, i. U. C. R. 551.

Action for escape—Verdict—Judgment without consideration.]—10. The Court refused to set aside the verdict in an action for an escape, on the ground that the judgment was without consideration. *Payne v. M'Lean*, Tay. U. C. R. 441.

Debt on bond—Breaches not assigned—Verdict for penalty.]—11. In debt on bond, to take a verdict for the penalty, where breaches have not been suggested or assigned in the replication, and the bond comes clearly under the statute 8 & 9 Wm. III., is irregular, and the verdict may be set aside. *Brock District Council v. Bowen et al.*, vii. U. C. R. 471.

12. *Semble*: That the breaches may be suggested even after verdict, and then the plaintiff may go down before a jury and assess his damages. *Ib.*

Verdict for defendant set aside, the plaintiff being entitled at all events to something.]—13. Where to an action brought by the principal against the sureties of a clerk for embezzlement &c., the sureties pleaded that the plaintiff was damnified of his own wrong in allowing the clerk to remain in his office after he had become aware of the fraud. *Held*, that though the fraud of the clerk was known to the principal long before he dismissed him from his employment, still, that as this knowledge could only apply to that portion of the monies taken by the clerk after the principal had been aware of his conduct, the plaintiff should have had a verdict for something, and that the verdict for the defendants (the sureties,) should be set

aside. *McDonald v. May et al.*, v. U. C. R. 68.

Verdict, subject to an award—No award—Verdict set aside.—14. A cause was referred at Nisi Prius and a verdict taken for the plaintiff subject to reference; award to be made by a certain day, with power to the arbitrators to enlarge the time; they did enlarge it once, but no award was made, and after that day had passed the defendant's attorney was asked by the plaintiff's attorney to consent to a further enlargement and declined; no application had been made to the arbitrators; the Court held they could do nothing more than set aside the conditional verdict. *Moulson v. Eyre*, v. U. C. R. 470.

[When judgment allowed on a conditional verdict of this kind—See JUDGMENT, 21 et seq.]

VOLUNTARY DEEDS.

See FRAUDULENT DEEDS ETC., 12, 13, 14.

WAGER.

See GAMING, 1.

WAIVER.

See APPEARANCE, 5.—ARBITRATION AND AWARD, VI. (2), 11.—ARREST, I. 40.—EXECUTION, 8.—INSOLVENT, ETC., 15.—INTERLOCUTORY JUDGMENT, 11, 14.—IRREGULARITY, 10.—JURY, 6.—PRACTICE, I. 19; II. 47; III. 8.—SET OFF, 13.—SHERIFF'S SALE, 3, 4.—WRITS OF TRIAL ETC.

Acceptance of notice of trial—Previous irregularities.—1. Where a defendant, after plea pleaded, obtained an order to stay the plaintiff's proceedings until security was given by him for costs, and the plaintiff delivered him a bond for such security, and at

the same time gave notice of trial, and the defendant signed an agreement to admit documents for the plaintiff at the trial, but afterwards returned the bond to the plaintiff, and gave him notice that he would move to set aside his proceedings if he went to trial, the plaintiff however tried his cause, and, on the motion to set the proceedings aside, his rule was discharged, as he had waived any irregularity or insufficiency in the bond. *Doe dem. Leonard v. Myers*, ii. U. C. R. 382.

Writ of trial to District Court—Appearance of defendant there—Previous irregularities.—2. A defendant, having appeared and examined evidence on an assessment of damages which had been carried down to a district court by a writ of trial issued from the Queen's Bench under our statute 8 Vic. ch. 13, sec. 54, has, by such appearance, waived any irregularity in the prior proceedings in the Queen's Bench, and cannot therefore move to set aside such proceedings under sec. 55 of that act. *Small v. Beasley*, iii. U. C. R. 141.

Asking further time to plead—Previous irregularities.—3. The plaintiff enters common bail for the defendant, without having filed an affidavit of the service of process; declaration is served and plea demanded. The defendant moves for further time to plead and to change the venue, the plaintiff afterwards signs interlocutory judgment, which the defendant moves to set aside for irregularity in the entry of common bail: *Held*, that the entry of common bail by the plaintiff, without filing the affidavit of service of process, was an irregularity only, which the defendant by his subsequent proceedings had waived. *Bridges v. Case*, iv. U. C. R. 127.

[See two cases somewhat similar—APPEARANCE, 5—IRREGULARITY, 10.]

Ejectment—Landlord applies to defend—Previous irregularities.—4. Where in ejectment the judgment

against the casual ejector is irregular, and the landlord, when first applying to a judge in chambers to be admitted to defend as landlord, takes no notice of the irregularity, the irregularity is waived. *Doe dem. Henderson v. Roe*, iv. U. C. R. 366.

Arbitration—Either party proceeding waive previous irregularities.]—

5. Where either party to an arbitration objects to what he conceives to be an irregularity in the mode of conducting the arbitration—as, for instance, against a certain person administering the oath to the witnesses—and takes his chance of the award, he cannot afterwards be permitted, on the same ground, to impeach the award. *Slack v. McEathron*, iii. U. C. R. 66.

WARDEN.

See DISTRICT COUNCIL, 16.—MANDAMUS, 2.

WAREHOUSEMEN.

See CARRIER, 5, 12, 16.—DELIVERY ORDERS.—MONEY PAID, 4.

WARRANT.

See ARREST, IV. 3.—DE INJURIA, 3.—DISTRESS, I. 11.—ESCAPE, 21.—FALSE IMPRISONMENT, 5, 7.—GAOLER, 2, 3, 4.—INDORSEMENT, I. 3.—MAGISTRATES, 2, 3, 5, 6, 12.

Direction of search warrant.]—1. Held, that the direction of a warrant to the constable of Thorold, not naming him, to execute the warrant in the township of Louth, was good. *Jones v. Ross et al.*, iii. U. C. R. 328.

[So a warrant directed—"To the messenger of the said court, and to his assistants, and to the governor or keeper of her Majesty's gaol of the castle of York," is sufficient, without naming the messenger. *Ex parte Good*, xvi. M. & W. 462.]

Seal.]—2. Semble: That a warrant having no seal does not make it invalid. *Fraser v. Dickson*, v. U. C. R. 231.

Ordering detention till costs paid.]—3. A warrant to a constable to commit for contempt, containing a direction to detain the party for the space of two weeks and until he shall pay the costs of his apprehension and conveyance to gaol, is defective. *Clarke et al., In re*, vii. U. C. R. 223.

For an indefinite time, or till costs paid, without stating the amount.]—4. A magistrate's warrant of commitment for an indefinite time is bad. A warrant of commitment is bad which directs the prisoner to be kept in custody till the costs are paid, without stating what is the amount of costs. *Dawson v. Fraser*, vii. U. C. R. 391.

5. *Quere.*—In a case on arrest, for want of finding sureties for the peace, is it necessary to state on the face of it that the justice had information on oath which would justify him in binding the prisoner to keep the peace? *Ib.*

6. *Semble.*—This would not be necessary in respect to warrants committing prisoners upon charges of offences committed. *Ib.*

WARRANT OF ATTORNEY.

*Action by attorney for his fees—Production of warrant.]—*A plaintiff and defendant having settled the action between themselves without paying the attorney's costs, the court refused to make the attorney produce his warrant in an action instituted against the bail to recover those costs. *Shankland v. Scantlebury et al.* Tay. U. C. R. 306.

WARRANTY.

*Action—Plea of not guilty.]—*In an action on the case on the warranty of a horse, under the plea of not guilty, the warranty is put in issue. *Honeywell v. Davis*, ii. U. C. R. 63.

WASTE.

See AMENDMENT, III. 9.

Action—Parties—What amounts to a waste.—An action on the case for a waste may be brought under 6 Edw. I. ch. 5, by him in remainder or reversion for life or years; and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber. *Taylor v. Taylor*, Easter Term, 1 Wm. IV.

WATER.

See ARBITRATION AND AWARD, IV. (3), 1, 2.—CASE (ACTION ON THE), 3, 9.—CROWN GRANT, 9.—EASEMENT, 3, 4, 5, 6.

Right to use.—1. The right which an individual has to a public navigable water, in its pure and natural state, is not founded upon the possession of the land or of a mill or house adjoining the water, but simply upon the same common law right which every other individual has to use the water in its unadulterated state, whether he possess lands, mills or houses on the bank or not. *Watson v. The City of Toronto Gas Light and Water Company*, iv. U. C. R. 158.

2. A proprietor of land on a stream has a right to the water flowing past him in its natural course, undiminished in quantity and quality; and nothing short of a grant or twenty years' use (which presumes a grant) of the water, in a particular way and for a special purpose, can entitle some one proprietor on a stream, in violation of this right of all, injuriously to divert or pen back the water from or upon proprietors living above or below him on the stream. *McLaren v. Cook et al.*, iii. U. C. R. 299.

[Acc.—*Action v. Blundell*, xli. M. & W. 349.]

Injury to a water course, injury to a permanent right—New trial.]

—3. An injury to a water course is considered as an injury to a permanent right, and in such a case the court will grant the plaintiff a new trial, although the probable amount to be recovered by a verdict may not be large. *Applegarth v. Rhymal*, Tay. U. C. R. 590.

Public nuisance—Private action.]

—4. A person throwing matter into Lake Ontario, or any other navigable water, is liable both to an indictment for committing a public nuisance and to a private action at the suit of any individual distinctly and peculiarly injured thereby. *Watson v. The City of Toronto Gas Light and Water Company*, iv. U. C. R. 158.

License, by a party having the right, to another to use it—Excess—Action.]

—5. Where the plaintiffs, who had built mills on a stream by indenture, granted a license to the defendant to make a raceway over their lands for a mill to be built by the defendant further down the stream, provided that the water was not thrown back thereby nor any injury or damage occasioned to the plaintiffs' mills, and after the defendant's mill had been erected, by an accumulation of ice on the by-wash, the water was forced back on the plaintiffs' mills: *Held*, that the plaintiffs might maintain an action for such injury, and that case, and not covenant on the indenture, was the proper form of remedy. *Eastwood et al. v. Helliwell*, Hil. Term, 5 Wm. IV.

When persons continuing a nuisance liable, and not those who erected it.]

—6. When at the time of making a dam the plaintiff sustains no injury, but afterwards, having built a mill, he suffers real damage, by the dam penning back the water upon the mill, he has no right of action against those who built the dam; he can only sue those who are continuing the dam at the time of the injury. *McLaren v. Cook et al.*, iii., U. C. R. 299.

WATER'S EDGE.

See CROWN GRANT, 9.

WAY.

See EASEMENT, 1.—EVIDENCE, I. 1; II. 12. — HIGHWAY, *passim*. — TRESPASS, I. 11.

Plea of right of way.]—In trespass *quare clausum fregit*, a plea of right of way under a deed must shew the parties to the deed. *Smith v. Smith*, Trin. Term, 3 & 4 Wm. IV.

WEEKLY ALLOWANCE.

See INSOLVENT ETC., *passim*.

WELLAND CANAL.

4 Geo. IV. ch. 17—*Withdrawal of directors.*]—1. Where in a clause of a prior statute the two directors of the Welland Canal having the smallest number of votes of the five chosen in a former election are declared to be ineligible at any subsequent election, and by a subsequent statute the number of directors was fixed at seven, and that statute named the persons who were to constitute the board until the next election — the Court held that two of the board having vacated their seats by non-residence, rendered it unnecessary for two of the remaining five to vacate their seats, as having the smallest number of votes at such subsequent election. *Re v. The Welland Canal Company*, Tay. U. C. R. 410.

Tolls.]—2. The Welland Canal Company are entitled to tolls for that part of the canal commonly called the Chippewa Cut. *Welland Canal Company v. Warren et al.*, Hil. Term, 1 Wm. IV.

WHARFINGER.

See CARRIER, *passim*.—COBOURG HARBOR COMPANY.

WHARVES.

See DISTRESS, I. 10.

WILL.

See DISTRESS, I, 12.—ESTATE.—EVIDENCE, I. 3; II. 6; VII. 5.—EXECUTOR ETC., I. 4.—INFANT, 5.—NEW TRIAL, II. 1.—TRUST ETC., 3.

When sufficient without registry.]—1. *Semble*: That a will is sufficient to give an estate although not registered, provided no previous transfer of the property has been registered. *Doe dem. Link v. Ausman*, Tay. U. C. R. 300.

Testator dying abroad—Time for registry of will.]—2. By the operation of the registry act 35 Geo. III. ch. 5, sec. 15, the devisee claiming under a writ *made abroad*, and where there has been no “inevitable difficulty” in the way of registering, is not allowed a period of six months within which to register the will; so that if the heir to the testator convey for value, and his grantee register at any time prior to the registry of such a will, the title is lost to the devisee. *Quære*, as to the effect of the act 35 Geo. III. 5 in registering the wills of persons dying abroad? By the act 9 Vic. ch. 34, sec. 2, all devisees *without exception* as to the will being made abroad, or the testator dying abroad, are allowed twelve months within which to register the will. *Doe dem. Eberts et ux. v. Wilson*, iv. U. C. R. 386.

[See the necessity for infant devisees to register the wills under which they claim—INFANT, 5.]

Registration—Ambiguity.]—3. It is no objection to lot 22 passing under a will that the registration of such a will changed in its most material contents can afford no information on the face of it as to what lands are affected by it. *Doe dem. Lowry v. Grant*, vii. U. C. R. 125.

What amounts to a devise.]—4. The words in a will, “I have already

given to my son John lot number one," do not constitute a devise. *Doe dem. Smith v. Meyers*, ii. O. S. 301.

Effect of illegal trust.—5. The devise of an estate is not wholly void because the estate has been charged to some extent with an illegal trust. *Doe dem. Vancott v. Read*, iii. U. C. R. 244.

Devise subject to an annuity.—6. Where a testator had bound himself by bond to pay to his mother 12*l.* 10*s.* annually, and devised part of his lands to his brothers on condition that they should pay to his mother 12*l.* 10*s.* per annum, and pay all his just debts, and made them his executors: *Held*, that at law the legacy could not be considered as a satisfaction of the annuity on the bond, and that the mother was entitled to both. *Cole v. Cole*, Easter Term, 2 Vic.

Personalty—Life estate.—7. A devise of the use, possession and occupation of a dwelling house and premises, with land attached, together with furniture, plate, linen, china, library and other effects therein at the time of the death of the testator, to occupy, possess and enjoy the said house, land, furniture and premises during the natural life of the devisee, does not give such an interest in the personal property so devised as to enable the devisee to dispose of it absolutely by will; and the executor of the testator giving notice to the executors of the devisee, may, at a sale of such property (by the executors of the devisee), purchase, and subsequently on an action brought resist the payment. *Dickson et al. v. Street*, i. U. C. R. 180.

Particular lots, though improperly numbered, pass under a general devise.—8. Where a testator, after devising to his wife for life all his real estate, stated the lots of land of which it was composed, and amongst others, the front half of a lot of which only the rear half belonged to him: *Held*, that the wife took a life estate in the

rear half under the general terms of the will. *Doe dem. Taylor v. Peterson*, iii. O. S. 497.

[Also see EVIDENCE, I. 3.]

Cancellation—What makes such an act complete—The situation of an heir when finding such papers.—9. Where A. meaning to make a new will and having the draft with him for that purpose, has cancelled the first will, not by making obliterations and alterations in the body of it, but by destroying the execution, as by tearing off his name and seal, and then dies suddenly before he has executed the other will: *Held*, that A. under such circumstances dies intestate. *Held also*, that the heir at law finding such old will cancelled, and the draft with it, is not called upon, in the absence of any imputation of fraud, to account for the cancellation of the old will. *Quære*: When the name and seal of a testator appears to have been struck out of a will, should the animus cancellandi be still left as a question of fact for the jury? *Doe dem. Crooks v. Cummings*, vi. U. C. R. 305.

Charitable uses.—10. Where trustees are directed by a will to dispose of an estate "as the ministers of a certain church may see fit," the devise is good, not being necessarily a devise to charitable uses. *Doe dem. Vancott v. Read*, iii. U. C. R. 244.

Will, a conveyance—Church Temporalities Act.—11. A will is in contemplation of law a "conveyance." Under the terms therefore of the 16th clause of the 3rd Vic. ch. 74, viz., "by deed or conveyance," a person may devise, as well as grant by deed, lands to the church of England for the purposes of that act. *Doe dem. Baker v. Clark*, vii. U. C. R. 44.

Codicil—Will, when perfect as a conveyance—Church Temporalities Act.—12. A. makes his will in 1843; in 1846 he adds a codicil to the will merely appointing a new executor "of his will written above." *Held*, that

the codicil was a confirmation and not a revocation of the will, and that the will must be still considered as a will made and executed in 1843. *Held also*, (McLean J. dissentiente), that the will as a conveyance was perfect at the time of its execution, though its effect could not be felt till the death of the testator, and that therefore the condition of the 16th clause of the act 3 Vic. ch. 74, requiring "a deed or conveyance to be made and executed six months at least before the death of the person conveying the same," might be complied with in the case of a will. *Ib.*

To whom devise may be made under 3 Vic. ch. 74, sec. 16.]—13. A devise under the statute 3 Vic. ch. 74, made to the bishop *and* the rector is good, notwithstanding the statute speaks of a conveyance to the bishop *or* rector &c. *Ib.*

WITNESS.

See ARBITRATION AND AWARD, VIII.

7.—ATTORNEY, IV. 2.—COMMISSION TO EXAMINE WITNESSES.—COUNSEL, 2.—EVIDENCE, II. 5; V. 2, 3, 5, 6, 7; VII. 2.—FORCIBLE ENTRY ETC., 2.—JUDGMENT, 2, 3. JUDGMENT AS IN CASE OF NONSUIT, II. 6, 7.—NEW TRIAL, III; VIII. 1; IX. 1.—PROCESS, 7.—SUBPŒNA, 1, 2, 3, 5.

Refusing to swear to execution of cognovit—Attachment.]—1. An attachment will not be granted against a witness to a cognovit who refuses to swear to its execution until a rule has been served on him ordering him to do so, and he has disobeyed it. *Ham v. Ham*, iii. O. S. 176.

Returning officer before House of Assembly — Expenses.]—2. Semble: That a returning officer whose conduct has been impeached is not entitled to his expenses as a witness before a committee of the House of Assembly,

although he was summoned to attend by the speaker's warrant in the same manner as the other witnesses. *Blacklock v. M' Martin*, Tay. U. C. R. 437.

Competency, co-obligors in a bond.]

—3. An obligor in a joint and several bond may be a witness for his co-obligor. *Bank of Upper Canada v. Widmer*, ii. O. S. 222.

Assignment by a debtor for his creditors — Bond to trustees — Debtor a witness.]—4. A person who assigns his property to trustees for the benefit of his creditors, is considered as a competent witness to a bond given to those trustees by one of his creditors. *Moffatt et al. v. Loucks*, Tay. U. C. R. 416.

Competency, partner.]—5. In an action against a firm as the indorsers of a bill of exchange, a partner not joined as defendant is not a competent witness, though released, for his co-partners to prove payment. *Ferrie v. Starkweather*, Dra. Rep. 426.

6. In an action for goods sold and delivered, a partner of the plaintiff not joined is a competent witness for the defendant to prove payment. *Wilson v. Stevens*, Mich. Term, 7 Wm. IV.

7. A joint contractor with the defendant, not joined in the action, may be a witness for the plaintiff, and a release (though unnecessary,) given by the plaintiff to him immediately before the trial to enable him to give testimony, will not operate as a discharge of the defendant, unless pleaded *puis darrein continuance*. *Boyce v. Parke et al.*, Easter Term, 7 Wm. IV.

Debtor, as a witness, proving his own deed void for usury.]—8. In an ejectment brought by a sheriff's vendee of lands sold on an execution, against a purchaser from the debtor before execution, in which it was contended that the deed to the defendant was usurious: *Held*, that the debtor was a competent witness to prove the usury. *Doe dem. Springsted v. Hopkins*, Trin. Term, 7 Wm. IV.

9. In ejectment by a mortgagee, his mortgagor is a good witness to prove the mortgage void for usury, if the defendant or tenant do not hold under him. *Doe dem. Mason v. Ballard et al.*, i. U. C. R. 2.

Security for costs given by witness.]

—10. A witness who has given security for costs in the cause may be sworn on paying the amount of his security into Court at the trial. *Buffalo Bank v. Truscott et al.*, Mich. Term, 2 Vic.

How incompetency waived.]

—11. If a witness be called for the plaintiff who is incompetent from interest, and he be afterwards called for the defendant the incompetency is cured. *Hall v. Shannon*, Easter Term, 2 Vic.

Competency, stockholder in a bank.]

—12. Where a witness, who was a stockholder and also president of a banking institution, stated in an action brought by the bank that he had released his stock for a nominal consideration to the directors, but that he had no doubt it would be restored to him, the Court held that the transfer was merely colorable, and that his testimony was inadmissible. *Michigan Bank v. Gray et al.*, i. U. C. R. 422.

Action against maker and indorser of a note—Competency of maker.]

13. *Semble*: In a joint action against the maker and indorser of a promissory under the statute, the maker is a competent witness for the plaintiff to prove notice to the indorsers. *Bradbury et al. v. Loney et al.*, Mich. Term, 5 Vic.

14. In a joint action against the maker and indorsers of a promissory note, the maker is a good witness against the indorsers. *McLaren v. Muirhead et al.*, iii. U. C. R. 59.

Action against sheriff's surety—

Competency of deputy sheriff.]

—15. The deputy sheriff is not a competent witness for a sheriff's sureties in an action against them for his misconduct in the execution of writs of fieri facias

delivered to him, unless released, nor can his competency be restored by indorsing his name on the record under 7 Wm. IV. ch. 3, secs. 18 & 19. *Roy v. Hamilton*, Hil. Term, 5 Vic.

Competency, joint maker of a note.]

—16. In an action against one of two joint makers of a promissory note, the maker not joined is a competent witness for his co-maker to prove illegality of consideration, on being released by him. *Phimery et al. v. Smith*, Easter Term, 7 Vic.

17. One maker of a joint promissory note is not a competent witness for the other maker, who alone is sued, without a release, as he is not indifferently liable to the payee and his co-maker, being liable in action by the latter for contribution to both damages and costs. *Dudley v. Moore*, iii. O. S. 71.

Competency, attorney in his client's cause.]

—18. Where in an action against the indorsers of a promissory note the defence was that the note had been stolen from one of the indorsers and had been delivered to the plaintiffs, knowing it to have been stolen, and that they did not take it in good faith, and the plaintiffs' attorney, by whom the note had been taken on their behalf, was offered as a witness at the trial to prove the circumstances under which it was taken, but being objected to as responsible over to the plaintiffs if the note had been taken through his negligence, was rejected, it was held that this rejection was improper, and that he was a good witness without a release. *Bank of British North America v. Holman et al.*, i. U. C. R. 309.

Attorney in a different cause.]

—19. An attorney is an admissible witness to prove by whom he was employed to sue out a bailable writ. *Beamer v. Darling*, iv. U. C. R. 249.

Competency, clerk of turnpike commissioners.]

—20. The clerk of the commissioners of a turnpike trust, who is empowered to sue for tolls under 3 Vic. ch. 36, is not a competent witness

in an action against the defendants for the tolls in which he is the nominal plaintiff. *Cummings v. Glassup et al.*, i. U. C. R. 364.

Trespass against a sheriff for wrongful seizure—Competency of debtor.—21. In an action of trespass brought against a sheriff for seizing the plaintiff's goods under an execution against the goods of A.: *Held*, that A. (the defendant in the execution) was not a competent witness for the sheriff to prove that he (A.) and not the plaintiff was the owner of the goods. *Robinson v. Rapelje*, iv. U. C. R. 289.

Ejectment—When witness may be rejected as incompetent.—22. Before a witness in ejectment should be rejected as incompetent, the precise connection of the witness with the premises claimed in the action should be shewn. *Doe dem. Vernon v. Wetherall*, v. U. C. R. 342.

Information for a penalty under Customs Act—Competency, surveyor of customs.—23. Under the imperial act 8 & 9 Vic. ch. 93, sec. 89, the surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty: he cannot therefore be rejected as an incompetent witness upon a case of information for a penalty for harboring smuggled goods. *Attorney General v. Warner*, v. U. C. R. 485.

Competency of widow to prove her deceased husband's title.—24. A widow woman, notwithstanding her right to dower, is a competent witness to prove the pedigree of her husband and his title to land. *Doe dem. Park et al. v. Henderson*, vii. U. C. R. 182.

Who may be, under 12 Vic. ch. 70.—25. Since the passing of the act 12 Vic. ch. 70, A. who had been sued in ejectment and allowed judgment to go against him by default, is a competent witness in favor of B. bringing his ejectment for the same lot, and relying upon A.'s evidence to prove that not-

withstanding his (A.'s) possession, B. was the party who had the legal title. *Doe dem. McDonell v. Rattray*, vii. U. C. R. 321.

Exception in 12 Vic. ch. 70—Witness beneficially interested.—26. *Semble*: That the exception in the statute 12 Vic. ch. 70 excluding the testimony of "any person in whose immediate or individual behalf any action may be brought," applies only to those cases where the plaintiff is only a nominal plaintiff, and the witness the person beneficially interested in the subject matter. *Ib.*

[See statute 14 & 15 Vic. ch. 66, making most material alterations in respect to the admissions of evidence, particularly in admitting the plaintiff and defendant in their own causes as witnesses.]

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WORK AND LABOR.

See ARREST, I. 31.—ASSUMPSIT, I. 2, 5, 10, 11.—CONTRACT, 1, 12.—CORPORATION, 4.—EVIDENCE, II. 3.—NONSUIT, 19.—PARTICULARS OF DEMAND, 9.

Materials not included.—On counts for work and labor and goods sold and delivered, the value of the materials found and provided for carrying on the work cannot be recovered. *Wilson v. De la Hooke*, Easter Term, 5 Vic.

[Upholding *Heath v. Freeland*, i. M. & M. 543.]

WRIT OF ERROR.

See APPEAL, 5.

WRITS.

See CAPIAS AD RESPONDENDUM—CAPIAS AD SATISFACIENDUM—DISTINGAS.—ELEGIT.—EXECUTION. HABEAS CORPUS.—HABERE CORPORA JURATORUM.—HABERE FACIAS POSSESSIONEM.—PARTITION, 4, 5.—PROCESS.—REPLEVIN ETC., 1.—SUBPŒNA.—VENDITIONI EXPONAS.—WRITS OF TRIAL AND INQUIRY.

WRITS OF TRIAL AND INQUIRY

Judge's order unnecessary, for writ of inquiry.—1. It is not necessary to obtain a rule of Court or a judge's order to warrant the issue of a writ of inquiry to a district court. *Northcote v. Hodder*, v. U. C. R. 635.

Issue of a writ of inquiry after cause made a remanet at Nisi Prius.—2. A plaintiff enters a record at the assizes to assess damages; the cause does not come on in its order, and is made a remanet; the plaintiff subsequently sues out a writ of inquiry to a district court; the defendant moves to set this writ aside and all subsequent proceedings, for irregularity, the cause having been made a remanet at Nisi Prius: *Held*, writ of inquiry regular. *Ib.*

Appearance at trial waiver of proceeding irregularity.—3. Where the defendant is represented at the trial

and has made his defence, the Court will not set aside the proceedings on the ground that no notice of the execution of the writ of inquiry had been given to the defendant. *Farrish v. Shields*, vii. U. C. R. 525.

[Also see WAIVER, 2.]

Setting aside writ—Notice of motion.—4. The notice of motion to set aside a writ under the 55th clause of 8 Vic. ch. 13, must specify the day on which the party will apply. *Bank of Montreal v. Denison*, iii. U. C. R. 136.

Motion to set aside proceedings under writ when irregularity in the writ itself.—5. A motion to set aside proceedings under a writ of trial in a district court, when the irregularity is in the writ itself and not in the subsequent proceedings, is bad. *Ib.*

Writ of trial, when attorney is defendant.—6. Under the 51st and following clauses of the 8th Vic. ch. 13, a writ of trial may go from the Queen's Bench to the judge of a district court in a cause, in which an attorney is the defendant. *The Bank of Montreal v. Burritt*, iii. U. C. R. 375.

[Afterwards upheld in *Martin v. Gwynne*, v. U. C. R. 245.]

Declaration claiming 75l.—Bill of particulars, 19l.—7. Where the declaration claimed 75l. for work and labor, but the bill of particulars only 19l., the cause is brought within the limits of the act and may be referred. *Martin v. Gwynne*, v. U. C. R. 245.

Writ of trial only to try issue—Assessment of damages.—8. Where the writ of trial is only to try the issue, and contains no special venire to assess damages, the jury have no authority to assess damages on breaches suggested. *Hunter v. Vernon*, vii. U. C. R. 552.

[See the strong language of the chief justice against the practice, to which he only assents on account of the inconvenience which might arise from pursuing a course of practice different to that followed in England under a like statute.]

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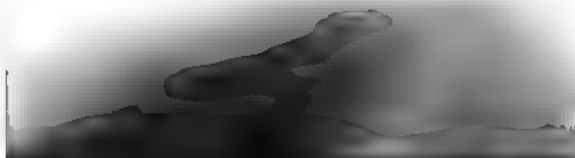
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CASES OMITTED.

ABSCONDING DEBTOR.—Proof of debtor's signature to a note, without proof of plaintiffs being the payees, considered sufficient proof of the debt. *Appleton et al. v. Dwyer*, iv. U. C. R. 247.

APPEAL.—This Court will reluctantly interfere with the judgment of a district court upon the evidence, unless it tend to repel any right of action. *Bradley v. Crane*, iv. U. C. R. 122.

Semble.—Effect must be given to a legal objection, though justice has been done. (Robinson, C. J., dubitante). *Kelly v. Baldwin*, iv. U. C. R. 143.

APPEARANCE.—Entry of common bail for a defendant arrested, is void. *Kauntz v. Cameron*, ii. O. S. 220.

DIVISION COURT.—A bailiff acting *bona fide* under 4 & 5 Vic. ch. 3, is entitled to notice before action. *Frooke v. Robertson et al.*, Mich. Term, 7 Vic.

EJECTMENT.—The plaintiff must go fully into his case in the first instance. *Doe dem. Osborne v. McDougall et al.*, vi. U. C. R. 135.

ESCAPE.—When the writ in the original suit is issued from a district court the declaration is sufficient, if it appear that the amount was within the jurisdiction; and it is not necessary to allege any affidavit of debt. *Donaghy v. Moodie*, ii. U. C. R. 133.

ESTOPPEL.—A covenant in a deed professing to be made jointly by husband and wife, but executed only by the husband, is not sufficient to work an estoppel. *Doe dem. Tiffany v. McGreen*, Mich. Term, 1 Vic.

LANDLORD AND TENANT.—A., in possession of land to which he pretends no claim, taking a lease from B., who represents himself to be the owner, is not estopped from putting B. to prove his title. *Doe dem. Radenhurst v. McLean*, vi. U. C. R. 530.

NEW TRIAL.—Refused in slander, when applied for on the ground of smallness of damages. *Atkins v. Thornton*, Mich. Term, 1 Wm. IV.; and *Proctor v. Allen*, Trin. Term, 2 & 3 Vic.

The motion will not be entertained after the first four days of term, unless under very special circumstances. *White v. Church*, iv. U. C. R. 23.

PARTICULARS OF DEMAND.—Particulars given in evidence by consent of the parties ought to go to the jury as a fact, to assist them in forming their verdict. *Keezar v. Empey et al.*, iv. U. C. R. 47.

PRACTICE.—In moving to set aside proceedings for a defect in form, copies must be produced. *Lount v. Demena*, Hil. Term, 4 Wm. IV.

PROMISSORY NOTES.—Though a note declared on vary from the pleadings, it is still evidence under the common counts. *Hathaway v. Malcolm*, Tay. U. C. R. 237.
A note made at Albany, U. S., may be so declared upon.—*Kirk v. Tannahill*, Tay. U. C. R. 619.

To set aside proceedings taken by a person in the name of the payee, besides the affidavit of the nominal payee, must be produced an affidavit of the defendant denying the note. *Taylor v. Rawson*, Tay. U. C. R. 663.

RECORD (NISI PRIUS).—A judge at Nisi Prius might order a record to be entered without the assent of defendant. *Henderson v. Hunt*, vi. U. C. R. 503.

RELIGIOUS SOCIETY.—Deed to, invalid without registry. *Doe dem. Bowman et al. v. Cameron et al.*, iv. U. C. R. 155.

SECURITY FOR COSTS.—The affidavit must state that plaintiff is not resident within the jurisdiction of the Court. *Redden v. McNab*, Hil. Term, 5 Wm. IV.

SHERIFF.—In trespass against a sheriff, for wrongful seizure, the warrant must be produced. *Lewis v. Jarvis*, Easter Term, 6 Wm. IV.

Attachment refused a year after rule issued. *Loucks v. Farrard*, Mich. Term, 3 Wm. IV.

SHERIFF'S DEED.—Deed necessary to complete a sale. *Doe dem. Moffat v. Hall*, Tay. U. C. R. 701.

SLANDER.—Words alleged to have been spoken by defendant in the third person are not supported by proof of words spoken by him in the first person. *Phillips v. Odell*, Hil. Term, 7 Wm. IV.

TAXES.—If a person overrated pay the overrate he cannot afterwards recover it back. *Semble*: Nor can he if he voluntarily pay, though protesting at the time. *Grantham v. The City of Toronto*, iii. U. C. R. 212.

TRESPASS *quare domum fregit*.—Plea: that the *close* was the freehold of defendant, good. *Crosby v. Reesor et al.*, ii. U. C. R. 183.

VENUE.—It is no ground for changing, that a person required as a witness at one assize will be an associate at another, and that from the distance he cannot attend both. *Smith v. Jackson*, Mich. Term, 1 Vic.

WITNESS.—It is too late to object to the competency of a witness after his examination, upon grounds known before he entered the box. *Powell v. Jarvis*, v. U. C. R. 489.

APPENDIX.

DIGEST OF ALL THE REPORTED CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

FROM EASTER TERM, 14 VICTORIA, TO
TRINITY TERM, 15 VICTORIA.

ABATEMENT.

Plea in.]—See “Non Joinder,” 1.

ACTION.

Former recovery.]—Where a plaintiff, going to a jury upon certain items of account, with evidence which the judge submits to their consideration at the plaintiff's request, fails in recovering those items, he is concluded by such a verdict, and cannot bring a second action for the same demand. *Proudfoot v. Lawrence*, 269.

ACCOUNT STATED.

With executors—Evidence sufficient to support.]—*Elliott v. Croker*, 156.

AFFIDAVIT.

Insufficiency of—*Extracts of letter not noticed.*]—1. Extracts of a letter embodied in an affidavit cannot be noticed; either the whole letter or a copy should be before the court, or, at least, it should be sworn that the letter contains nothing more relating to the action. *Vaughan v. Ross et al.*, 506.

Insufficiency of.]—In moving for a new trial, an affidavit by one of two

defendants that he never was served with process or other paper in the cause, nor did any such writ or paper ever come to his knowledge; that he never, directly or indirectly, retained, employed or authorised the attorney who appeared for both defendants to do so, is not sufficient. He should also have denied knowledge that such a suit was going on. *Ib.*

AGREEMENT.

See FRAUDS (STATUTE OF); ASSUMPSIT, 1; NOTICE, 3.

Evidence by subscribing witness to an agreement signed by an illiterate person.]—1. Where the subscribing witness to an agreement, signed by a person who could not write, swore that the agreement was not read as it stood upon the record, the Court held that the plaintiff, relying on the agreement, was properly nonsuited. *Hatton v. Fish*, 177.

No absolute necessity to put the hand on the seal.]—2. *Ib.*

Parol cannot vary contract of conveyance.]—3. *Cayley v. McDonell et al. Assignees of Bethune*, 454.

ALDERMAN.

Qualification for alderman for the town of Kingston.—Although the statute 9 Vic. ch. 75 has been repealed, yet so long as no new assessment law is passed, the same residence is a necessary qualification for an alderman as formerly. *The Queen ex rel. Bartliffe v. O'Reilly*, 617.

ANNUITY DEED.

See USURY, 1.

ARBITRATION AND AWARD.

Power of arbitrators—Expiration of time appointed]—1. Arbitrators, after the time for making their award has expired, cannot, without (even if they can with) the concurrence of both parties to the submission, make a binding award. *Ruthven v. Ruthven*, 12.

Award—Evidence of an account stated.]—2. And where, to a special count upon the award, there was added an account stated: *Held per Cur.*, that an award so given could not be taken as evidence of such account stated, as the arbitrators could not be said, after their authority had expired, to be proceeding with the defendant's assent, and to be stating an account for him as his agent. *Ib.*

ARMY.

See JURISDICTION, 1.

ARREST.

Right of private person to arrest without a warrant for supposed felony, when it can be justified]—1. When a private person, not being by office a keeper of the peace or a justice or constable, takes upon himself to arrest another without a warrant, for a supposed offence, he must be prepared to prove and affirm it clearly and unequivocally in his plea, that felony has

been committed; strong suspicions of a felony having been committed will not do. *McKenzie v. Gibson*, 100.

Power of Commissioners.]—2. Commissioners have no power to issue bailable process under 2 Geo. IV. ch. 1, sec. 9, since the passing of 12 Vic. ch. 63. *McIntyre v. Hutson*, 560.

ARREST OF JUDGMENT.

Several counts bad.]—*Held*, it is no ground on which to arrest judgment that the jury found the goods liable to forfeiture on several counts, only one or two of which are good. *The Queen ex rel. Attorney General v. Brunskill*, 546.

ASSIGNEES.

See BANKRUPT, 1.

ASSUMPSIT.

Liability of owner of chartered boat for supplies.]—1. The mere owner of a chartered boat is not liable for supplies furnished to the person chartering or at the request of his agents, unless it can be proved that he is so liable by express agreement between himself and the charterer. *Lyman et al. v. The Bank of Upper Canada*, 354.

Bank of Upper Canada incapacitated by charter from being ship-owners.]—2. The Bank of Upper Canada being incapacitated by our statute 6 Vic. ch. 27 sec. 19 from holding ships, either in absolute property or as mortgagees, it follows, as a consequence, that no implied assumpsit can arise against them as ship-owners. *Ib.*

[See *McDonald et al. v. The Bank of Upper Canada*, 7 U. C. R. 252.]

ATTACHMENT.

See SHERIFF, 6.

ATTORNEY.

See GUARANTEE, 1.

One attorney suing another—Right of defendant to a bill one month before action, or to a bill at some time before action brought.]—Where one attorney is suing another, it is not necessary to deliver a bill one month before action brought. The statute of 3 Jac. I., which is still in force, requires a bill to be delivered at some time before action brought, in a case by one attorney for business done for another attorney, not agency business, but as for any other client. *Draper et al. v. Beasley*, 260.

AUDITA QUERELA.

5 Geo. II. ch. 7.]—The Court refused to grant an order for a writ of *audita querela* to issue where the applicant was a stranger to the judgment, having no other privity than that he was alienee of the land which was taken in execution, and having acquired his interest after execution had issued. *Beard, administrator, &c. v. Ketchum*. 523.

BANK OF UPPER CANADA.

See ASSUMPSIT, 1.

Express promise not within terms of charter.]—It will also follow that no express promise on the part of the bank can be binding, as the directors cannot, under the corporate seal or otherwise, bind the funds of the bank by any contract not embraced in their charter. *Lyman et al. v. The Bank of Upper Canada*, 354.

BANKRUPT.

See PLEADING, 17.

Assignment of property for benefit of creditors—Debtor's subsequent bankruptcy—As to vesting of same property in assignees under the bankruptcy

law.]—The effect of a legal assignment of property to trustees for the benefit of creditors is, that it divests the beneficial interest of the property assigned from the party making it; and persons afterwards becoming assignees of his estate, under the bankrupt laws, do not take it as his assignees, for they acquire a legal interest in such property only as can be applied to the payment of his creditors generally under the bankrupt law. *Anderson et al., Assignees, &c. v. Gumble*, 437.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PLEADING, 16, 21, 33.

Special defence to note—Application by holder other than as intended.]

—1. Where a party is made the holder of a promissory note for one purpose, he cannot, contrary to good faith, apply it to another; where, therefore, a note endorsed generally was put into the hands of A. to get it discounted for the maker, B., and, instead of doing this, B., owing him (A.) a debt, he discounted it for his own benefit, and, as found by the jury, after the note had matured, it was *held per Cur.*, that these facts constituted a good defence to the action, and that the verdict for defendant could not be disturbed. *Kerr v. Street & Bradshaw*, 82.

Discharge of note by taking mortgage and acting upon it.]—2. *Held per Cur.*, upon the deeds, pleadings and facts, as given at length in the statement of the case below, that the defendants, the endorsers, were discharged from their liability on the promissory notes sued upon, (though not so intended by the plaintiffs) in consequence of the plaintiffs having taken from the maker a mortgage of certain steamboats containing a power of sale in case of default in the payment of the notes, and upon which, default

having been made, the plaintiffs had sold the steamboats to third parties for the amount of the defendants' liabilities on the notes, giving credit to the purchasers for the purchase money, and taking their notes and a mortgage on the same boats as security for its due payment. *Bank of British North America v. Jones et al., Executors, &c.* 86.

Sufficiency of notice of non payment.]—3. A notice of non payment addressed to no one by name, nor to any street or house, or place of business, but merely "to the executrix or executor of the late Mr. Jones, Toronto," is bad. *Ib.*

Parties paying a note for another—From whom do they take the transfer of the note, and what is their right of suit as against parties to the note.]—4. The bail of any of the parties who are sued upon a bill or note, or any persons who pay the bill or note on account of any of the parties, become, on payment, holders; and they hold as upon a transfer from the person for whom they made the payment, not as a transfer from the person they have paid; and they stand, with respect to other parties to the bill or note, in the situation of the party for whom they have made the payment; and consequently, unless he could have sued upon the bill or note, they cannot. *Hutchinson v. Munroe.* 103.

Pleading—Duplicity.]—5. A plea by the defendant that he did not indorse the notes, and that A. B. did not make the notes, is bad for duplicity. *Bank of Upper Canada v. Sherwood.* 116.

Pleading—Averment as to note not being presented.]—6. Where a note is made payable by A. B. at the Bank of Upper Canada, a plea averring that the said note was not duly presented to the said A. B. when it became due is good. *Ib.*

Endorser pleading the taking of mortgage by holder from maker, in discharge.]—7. There is no reason why the holder of a mortgage security should not take in addition a note from the mortgagor with an indorser; and the fact that the time mentioned for the defeasance of the mortgage is a period beyond the time at which the note will mature, is, in the absence of fraud, no defence to the indorser. *Ib.*

What is the issue on the pleadings.]—8. *McNab v. Adamson,* 119.

Parties liable in the order in which they stand on note, any agreement to the contrary notwithstanding.]—9. Parties to promissory notes are now held liable, contrary to the older cases, in the order in which they stand on the note, and the last holder may so treat them, notwithstanding any agreement among themselves, and notwithstanding that some one of the later parties to the note may be the person for whose accommodation it was in fact made, and who therefore is ultimately liable upon it, and this even when the person last holding the note is aware of the facts. *George Elder v. Daniel Kelly,* 240.

Evidence of protest and presentment.]—10. The effect of 7 Vic. ch. 4, sec. 2, is to make the certificate of a notary *prima facie* evidence of the protest of a bill or note; and of sec. 3, to make the production of a protest *prima facie* evidence of presentment. *Codd v. Lewis,* 242.

Plea, that plaintiff (the payee of bill) was not the holder at the time of commencement of suit.]—11. In an action brought by the payee of a bill of exchange against the drawer, a plea by the defendant "that, at the time of the commencement of this suit the plaintiff was not the holder of said bill," without averring specifically an indorsement to some one else, is bad. *Boys v. Joseph,* 273.

Sufficiency of annexing copy of note to protest—Indorsing on protest certificate of notary as to notice—7 Vic. ch. 4.—The annexing of a copy of the promissory note to the protest, or affixing it to the notarial act, is sufficient. *Lyman et al. v. G. S. Boulton*, 323.

The certificate of the notary, signed by him, of notice sent, indorsed on the protest, instead of being written "on the foot of or embodied in the protest," sufficiently complies with our act 7 Vic. ch. 4. *Ib.*

Note—Notice of non payment.]—13. G. Ross indorsed a note in blank. His agent, being asked by plaintiff's agent where he G. R. resided, gave an erroneous direction, which plaintiff's agent wrote in pencil under the indorser's name. Notice of non payment was sent to indorser at such supposed place of residence, and held that such notice was sufficient. *Vaughan v. Ross et al.* 506.

BOAT.

See ASSUMPSIT, 1.

BOND.

See PLEADING, 30.

Variance between declaration and bond as set out on oyer.]—1. See "Pleading."

Bond fraudulent as to creditors of insolvent.]—2. A commission of bankruptcy issued against J. V., one of two joint makers of a promissory note to plaintiff. J. V. was desirous of effecting a compromise with his creditors. The plaintiff agreed to this, provided the residue of the debt due on the note was secured to him. Defendant gave plaintiff a bond that he would secure the payment of such residue on real estate. Held, on general demurrer to the declaration, that the bond was void;

that the objection that this bond was in fact given in behalf of the other joint maker E. V., and not of J. V. the insolvent, was not valid. *Smith v. Dittrick*, 589.

BY-LAW.

See MUNICIPAL COUNCIL, 4; ROAD, 1.

Power of Court to quash by-laws.]—1. Under the 155th and 192nd clauses of the Municipal Corporation Act, 12 Vic. ch. 81, this Court has the power of quashing a by-law, not only for some illegality appearing upon the face of it, but also where, as a matter of fact, the by-law has been made in such a manner as it is enacted by the 192nd clause it shall not be lawful for any municipal corporations to make it. *In re Lafferty v. Municipal Council of Wentworth and Halton*, 232.

Refusal of Court to quash.]—2. In this case, under the facts mentioned, the Court refused to quash a by-law for changing a road, on the grounds—1st. That notices had not been put up, as the act requires; and, 2ndly. That the applicant had not given his consent to the road passing through his orchard. *Ib.*

Notices of.]—3. Corporations should be careful to preserve proof of regular notices, by affidavit, of persons employed to put them up. *Ib.*

How it should be proved]—4. *The Queen ex rel. Gamble v. Burnside & Morgan*, 263.

Quære.]—5. Has a municipal council power under 12 Vic. ch. 81, sec. 14, to pass a by-law declaring that there shall be "no new inn?" *Ib.*

Compensation to proprietors.]—6. See "Pleading," 22.

Action may be brought before by-law quashed.]—7. See "Pleading," 22.

4 & 5 Vic. ch. 10—*By-law bad for want of certainty.*]—8. Under the authority of 4 & 5 Vic. ch. 10, a by-

law was passed by the District Council, 30th June 1848, establishing as a public road "The road laid out by J. E. surveyor, between, &c., as appears by his report, bearing date, &c.;" but it did not refer to the report as annexed, neither was the line of road set out, nor the width stated in the by-law: *Held*, that the by-law was deficient in necessary certainty, and must therefore be quashed. *In re Brown v. Municipal Council of County of York*, 596.

CASE.

What not ground for objection to form of action.]—The defendant, setting up as his defence that his act complained of was illegal and wholly unwarrantable, does not give ground for the objection on his part that trespass and not case should have been the form of action. *Higson v. Thompson*, 561.

CERTIFICATE.

For full costs.]—See "Costs," 4.

CERTIORARI.

See CONVICTION, 1, 2.

COGNOVIT.

Cognovit taken through the intervention of a practising attorney.]—A clerk of the plaintiffs received from an attorney a printed blank cognovit with his name printed on the back. The clerk filled it up as to amount and terms as he thought fit, and taking it to defendant it was executed in the presence of the clerk only: *Held*, that the cognovit had not been taken through the intervention of a practising attorney within the rule, and must therefore be set aside. *Kay et al. v. Grant*, 175.

COMMON CARRIERS.

Implied liability of stage-coach proprietor for loss of letter containing a promissory note.]—*Held per Cur.*, that the stage-coach proprietor (who was also the contractor for carrying the mail) was not liable under the facts of this case for the loss of a letter containing a promissory note. *Holman v. Weller*, 202.

CONSENT RULE.

See EJECTMENT, 4.

Consent rule—As to annexing it to the record.]—It is not necessary in ejectment to annex the consent rule to the record. The Court may allow it to be produced in court at the trial, after an objection to its non production has been made. *Doe dem. Fulmer v. Huffman*, 325.

CONSTABLE.

Constable's admission that he had justices' warrant will not entitle him to an acquittal.]—The admission by a constable, sued in trespass with two justices that a paper produced at the trial was a copy of the warrant under which he committed the trespass, is not sufficient evidence as against the justices to entitle the constable to claim an acquittal under the 6th section of the 24 Geo. II. ch. 44. *Kalar v. Cornwall et al.* 168.

CONTRACT.

Want of mutuality in—Lien.]—1. *Held*, that a foreign legislature could make no law creating a lien on legal estate in Canada, and consequently that any contract founded on such a consideration was void *ab initio*. *Genesee Mutual Insurance Company v. Westman*, 487.

Departure from terms of contract—Quantum meruit.]—2. Where the

terms of a sealed contract have been so far departed from as to put it out of the power of the contractor to sue upon it, he will not be precluded, after his employers have accepted the work, from bringing his action for the value of the work done. *Turley v. Grafton Road Company*, 579.

CONVEYANCE.

See COVENANT, 1.

Contract of conveyance cannot be added to or varied by a parol agreement.]—Held, that the assignment by D. B. to Bank U. C., could form no legal charge on the boats, for a contract of conveyance cannot be added to or varied by a parol agreement. *Cayley v. McDonnell et al., Assignees of Bethune*, 454.

CONVICTION.

12 Vic. ch. 81, sec. 72, 185—*Quashing conviction by mayor under act.*]—1. Held per Cur., that the defendant, appearing on the evidence, returned *bona fide*, to have asserted a claim to the land which he had enclosed, it was not a proper case for the adjudication of the mayor (of Belleville) under the 72nd or 185th clause of the statute 12 Vic. ch. 82; and that, consequently, the mayor's summary conviction of the defendant, under that act, might be quashed by *certiorari*. *The Queen v. Taylor*, 257.

Should be quashed where there was no jurisdiction.]—2. *Ib.* 260.

CORONER.

See JURY, 2.

COSTS.

See COVENANT, 3.

What sheriff may recover under indemnity bond.]—1. See "Indemnity Bond," 1, 2.

When notice of trial irregular.]—

2. *Grand River Navigation Co. v. Wilkes*, 249.

3. Judge of County Court entitled to costs when rule discharged, which it was absurd to call on him to answer. *Ford v. Carrall*, 274.

22 & 23 Car. II. ch. 9—*Battery—Power of judge to withhold certificate for full costs.*]—4. In an action for assault and battery, where a battery has been proved, the judge nevertheless has a discretion to withhold a certificate for full costs, under the 22 and 23 Car. II. ch. 9.—*Carr v. Trotter*, 324.

COVENANT.

See DAMAGES, 2; PLEADING, 3.

Evidence necessary to support.]—1. Where a party binds himself to make a good and effectual conveyance of land, he must not only prove, to satisfy this condition, that he has executed a deed which will be effectual, if he has legal title, but he must shew that he has the legal title, and that the land did actually pass by his deed. *Toland v. Bruce*, 14.

Breach of Covenant—Damages, where land sold by vendee's own negligence.]—2. Upon a breach of covenant, a party is liable only for such damages as are the natural consequences of his act or omission. Where therefore the vendee of land allowed it to be sold for taxes which had accrued during his vendor's time, and neglected to redeem it within the year afterwards: Held per Cur., that he could not as of right recover damages to the value of the land so allowed to be sold. *McCollum v. Davis*, 150.

Covenant for title—Costs plaintiff put to on being ejected—Right to these in damages.]—3. In an action of covenant for title: breach, that the defendant had no title and no right to convey, charging eviction, and claim—

ing damages for costs incurred by the plaintiff in his defence against a person having paramount title: *Held per Cur.*, that the plaintiff was entitled to recover the costs he had been obliged to pay in defending himself in the suit of ejectment under which he had been dispossessed. *Brennan v. Servis*, 191.

Covenant for rent—Plea of lessor's acceptance of prior rent from assignee of lessee]—4. To an action in covenant for rent, a plea relying on the plaintiff's acceptance of assignees as his tenants, and on his receipt of prior rent (not the rent sued for) from them, as relieving him (the lessee and defendant) from any further liability for rent subsequently accruing, is a bad plea, as being no defence to an action on an express covenant. *Stinson v. Magill*, 271.

For good title.]—5. See "Damages," 2.

Who representative of covenantee for good title.]—6. In the covenant for good title, it is only the assignee of the fee who can represent the covenantee, the devisee of a life estate cannot do so, and consequently, if disturbed in his possession, he (the devisee) cannot sue the covenantor for breach of his covenant. *Clark v. Robertson*, 370.

CREDITORS.

Bond fraudulent as to creditors of insolvent.]—1. See "Bond."

Parol contracts and contracts under seal equally vitiated by fraud]—2. *Held*, that where fraud is objected, the distinction between sealed instruments and engagements by simple contract will avail nothing. *Smith v. Diltrich*, 589.

CROWN GRANT.

Statute of Uses—How far applicable to patents from the crown—The

cestui que use, being a lunatic, how far a use could be executed in his heir after the lunatic's death]—1. The crown granted land by letters patent to John Snyder, "in trust for his son Isaac Snyder, a lunatic, his heirs and assigns for ever, to have and to hold the same land to him, the said John Snyder, his heirs and assigns for ever:" *Held*, per Draper, J. and Burns, J. (Robinson, C. J. dissentiente) that this patent coming, as any other mode of assurance, under the operation of the Statute of Uses, 27 Henry VIII. ch. 10, if it did not, from particular considerations applying to the lunatic only, vest the real estate in him, yet that it nevertheless created a use which, on the death of the lunatic, was executed in his heir, and that therefore a deed, made by the heir after his death, would be valid as against a deed executed by the grantee of the crown. *Doe Snyder v. Masters et al.*, 55.

Grantee of Crown—How he may treat possessor without title.]—2. The grantee of the crown has the same right as the crown has to treat the possessor without title as a trespasser; he is not disseized by the continuance of a possession that has been held wrongfully as against the crown. *Doe dem. Charles v. Cotton*, 313.

CUSTOMS.

See PLEADING, 24.

Provincial act 10 & 11 Vic. ch. 31, sec. 58—As to right to proceed against and condemn goods under act seized by collector before act passed]—1. Where a collector of customs had made a seizure of goods in May 1847, and filed his information upon it in 1848: *Held per Cur.*, that such goods might be taken to be as condemned goods, if no claim should be made within month after notice of the information had been published as the 58th clause of the provincial statute 10 & 11 Vic.

ch. 31 directs. *Davidson v. Brethom*, 219.

Invoice—What due entry of goods.]—2. Held, that the entry of goods on invoices not the invoices of sale to the importer in the country where he purchased (which are not such as the law requires him to produce) and an entry without the oath the law requires, is not a *due entry*, necessary to give the right to unlade. *The Queen ex rel. Atty. Gen. v. Brunskill*, 546.

Power of colonial legislature.]—3. Held, the colonial legislature has power to impose duties of customs, to punish infringement, to enforce payment, and to resort to forfeiture if necessary. *Id.*

DAMAGES.

See SHERIFF, 6.

Measure of, for breach of covenant.]—1. *McCullum v. Davis*, 150.

Covenant for good title—What the damages.]—2. In an action for breach of covenant of good title the measure of damages is the amount of purchase money paid, with interest from time of payment—the plaintiff, however, if dispossessed by an ejectment, is also entitled to the costs of the ejectment suit—no allowance to be made by the jury for the plaintiff's improvement on his land. *Clark v. Robertson*, 370.

DEATH.

See EVIDENCE, 7.

Presumption of, in law.]—See "Evidence," 7.

DEBT.

See MUNICIPAL COUNCIL, 2.

When it will lie for one instalment due on a mortgage.]—1. *De Tuyl v. McDonald & Piper*, 171.

Mortgage—Proviso a mere defeasance—No evidence of a loan or debt

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—*Action of debt does not lie on mortgage alone.*]—2. Where the proviso in a mortgage is a mere defeasance that if the mortgagor pay the money by a certain day he shall have back his land; but there is no covenant to pay the money, and where no evidence is given of a loan or debt, an action of debt will not lie. Where there is evidence of a loan or debt, of course a promise to repay it will be implied. *Hall v. Morley*, 584.

DEBT ON BOND.

Plain intention of parties must govern.]—*Baby v. Baby*, 76.

DECLARATION.

Averment in.]—See "Pleading," 1.

DEED.

See PLEADING, 1, 5.

Mutilation of.]—1. If it be clear to the satisfaction of a jury that a deed, once perfect, has afterwards had its seal and signature torn off, or has become otherwise mutilated by accident, or the effect of time, such mutilation does not render it invalid. *Doe dem. Ellis v. McGill*, 224.

Exception to execution of.]—2. See "Pleading," 15.

Deed by reversioner not in possession.]—3. A deed given by the reversioner is good, notwithstanding that at the time it was given another person, holding under the life estate of the tenant by the courtesy, was in actual possession. *Doe dem. Burnham et al. v. Bower*, 607.

DISTRESS.

See LANDLORD AND TENANT, 1.—SURRENDER.

DOWER.

Tenant pleading tout temps prist.]—1. Where the husband dies seized, unless the tenant sued in dower pleads *tout temps prist*, the demandant may recover damages without setting forth or shewing a demand. *Empey v. Loucks*, 374.

When Statute of Limitations begins to run in dower.]—2. The court in this case confirmed the opinion expressed in *German v. Grooms*, 6 U. C. R. 415, that the action of dower is within our Statute of Limitations 4 Wm. IV. ch. 1, and must be brought within twenty years *after the death* of the husband. *McDonald, (widow) v. McIntosh*, 388.

Effect of widow's possession as to commencement of twenty years.]—3. The fact that the widow has been allowed to remain *in the possession* of her husband's land, to a period close upon twenty years from the time of her husband's death, makes no difference as to the necessity she is under of suing for her dower *within* the twenty years after his death. *Ib.*

Widow's right to.]—4. Where a will expressly declares that what is given to the widow is intended to be in lieu of dower, and where the widow accepts it, she is as much bound by her election in a court of law as in equity. *Walton v. Hill*, 562.

2. A widow cannot so far elect to take under a devise as to enter *into possession* of the whole property out of which she claims dower, and yet sue for her dower, when that was part of the property expressly devised to her in lieu of dower.

[See the plea in this case and the applicability of this principle to such plea.] *Ib.*

EASEMENT.

See LICENSE, 2.

Twenty years' user, running against the Crown.]—A defendant having for more than twenty years next before the bringing of the action, penned back water upon the land above him, by means of a dam erected on his own land, is protected by our statute 10 & 11 Vic. ch. 5, *although* the land flooded by the back-water belonged to the Crown during the greater part of that period. *Boulby v. Woodley*, 318.

EJECTMENT.

See COVENANT, 3.—CONSENT RULE, 1.—HEIR, 1.—PARTNERSHIP, 1.

Demand of possession.]—1. See "Partnership," 1.

Guardian and infant—Who to sue in ejectment.]—2. A guardian appointed to an infant, under our act 8 Geo. IV. ch. 6, sec. 2, may bring ejectment for the purpose of trying the infant's title. *Semble*, that an ejectment may also be brought in the name of the infant. *Doe dem. Atkinson v. McLeod*, 344.

Covenantor for title liable for costs in.]—3. *Clark v. Robertson*, 370.

Mistake in consent rule.]—4. Ejectment for north half of a lot of land. Defendant by mistake entered into a consent rule for more than he asserted title to, and verdict was taken against him. The lease he intended to set up at the trial was for south half of the lot. *The Court* granted his motion to be allowed to defend for the portion of the north half he claimed to have been leased to him, on payment of costs within a month. *Doe Hall v. Shannon*, 528.

Ejectment—Defendant prevented by his own act from setting up adverse title.]—5. The defendant, being an occupant of land, went to the lessor of the plaintiff of his own accord,

made an offer to purchase the land, and made a payment on account: *Held*, that he was thereby prevented from maintaining an adverse possession, or putting plaintiff to further proof of title. *Doe dem. Boulton v. Walker*, 571.

ERRONEOUS SURVEY.

Power of Court to stay the issue of hab. fac. poss.]—Upon the facts of the case (given at length below), it was *held per Cur.*, that they had no authority under the 12th clause 59 Geo. III. ch. 14, to stay the proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe dem. Short v. Bass*, 147.

ESCAPE.

See SHERIFF, 6.

ESTOPPEL.

See VARIANCE, 1.—INSURANCE, 1. LEASE, 1, 2.

1. Plaintiffs estopped from denying payment of notes, when they had taken a mortgage as security for their payment, and under a power of sale herein contained had sold to third parties for the amount of the notes. *Bank B. N. A. v. Jones et al. Executors*, 86.

Trover — Assignment.]—2. *Held*, that plaintiff was not estopped by his assignment to B. U. C. from treating these defendants, at least as guilty of a conversion of his property. *Cayley v. McDonell et al., Assignees of Bethune*, 454.

A cause which is res inter alios acta cannot act as an estoppel.]—3. *Held*, that the sheriff and his sureties are not concluded by the decision in another suit in the county court with regard to the fact of the arrest being made, no estoppel being pleaded, nor could such

decision act as an estoppel, being in a cause which was *res inter alios acta*. *McIntosh v. Jarvis et al.*, 537.

Estoppel by matter of record.]—4. A judgment in a former action is not admissible as evidence in a subsequent action not between the same parties. *Doe dem. Burr v. Denison*, 610.

EVIDENCE.

See ARBITRATION AND AWARD, 1.—COVENANT, 1.—GRANT.—HEIR, 1. MALICIOUS PROSECUTION, 1.—ESTOPPEL, 4.

Obstruction of public road.]—1. *Semble*: That a gate being kept across a road is not in any case *conclusive* as to the road being a public one—the gate may have been there for the purpose of preventing cattle straying. *Johnston the younger v. Boyle*, 142.

Parol evidence not admissible, of lost patent of land.]—2. *McCollum v. Davis*, 150.

Of subscribing witness to agreement.]—3. See "Nonsuit," 1.

Books of agent of public company —How far admissible in evidence to charge surety on his bond for defalcation of agent, agent being alive.]—4. *Held per Cur.*, (Robinson, C. J., *dissentiente*), that the books of the agent or clerk of a public company during his life time are not good evidence against his surety, sued on his bond for a deficiency in the agent's accounts. *Ferrie v. Jones et al., Executors, &c.*, 192.

To connect plaintiff in original suit with writ.]—5. To connect this person with the writ, the writ itself should be produced; or, to let in secondary evidence, the writ must be shewn to have been lost, or notice proved to the opposite party to produce it, unless the defendant has adopted the arrest as made at his instance, as by filing affidavits in justification. *Thorne v. Mason*, 236.

Of protest and presentment.—6. The effect of 7 Vic. ch. 4, sec. 2, is to make the *certificate* of a notary *prima facie* evidence of the *protest* of a bill or note; and of sec. 3, to make the production of a *protest prima facie* evidence of *presentment*. *Codd v. Lewis*, 242.

Presumption of death, on whom onus of proof of death.—7. The Court in this case confirmed the opinion they expressed in 4 U. C. R. 410, as to the period (seven years) which an absent party, of whom nothing has been heard, will be presumed in law to be dead; and also, as to the onus of proof of the party's being dead *within that period* resting upon the person who desires the jury to find that fact in his favor. *Doe dem. J. S. Hagerman v. Strong and Young*, 291.

Contents of will—Onus probandi.—8. See "Heir," 1.

Trespass—Pleading—Evidence.—9. *Trespass de bonis asportatis*—Pleas—1st, not guilty. 2nd, goods not property of plaintiff. *Held per Cur.*, that under these pleas, the defendant desiring to give in evidence that the goods belonged to a third party, and that a *fourth* party had a right as landlord to follow and seize these goods, and that he, the defendant, deriving his authority from such *fourth* party, was justified in having seized them, such evidence was rightly rejected, and that the defence should be specially pleaded. *Tyson v. Little*, 434.

Under plea of non tenuit.—10. Under the plea of "non tenuit" evidence is rightly received to shew that the defendant had parted with his estate to another person, and was no longer the plaintiff's landlord. *Lewis v. Brooks*, 576.

Trespass—Replication, de injuria.—11. Though the motive and intention with which a defendant insisted on the plaintiff's leaving his house can-

not be enquired into on the traverse *de injuria*, yet the truth of the assertion that he assaulted him *in order* to make him depart, may be called in question. *Davis v. Lennon et al.*, 599.

EXECUTORS AND ADMINISTRATORS.

See ACCOUNT STATED, 1.

Test, whether they sue in representative capacity.—1. To determine whether a demand sued for on the record is one claimed by the plaintiffs in their *representative capacity*, as executors, or not, the test now is, would the money when recovered be assets of the estate. *Elliott et al. v. Croker et al.*, 156.

Refusal to convey.—2. Under the statute 21 Henry VIII. ch. 4, one or more of several executors has power to convey when the others decline to act. *Doe dem. Ellis v. McGill*, 224.

What sufficient proof of refusal to act.—3. A written renunciation, though not sealed, made by one or more executors before the surrogate, and produced from his office, is sufficient to entitle the remaining executors to act under 21 Henry VIII. ch. 4. *Ib.*

FELONY.

Right of private person to arrest for a supposed felony.—*McKensie v. Gibson*, 100.

FIERI FACIAS.

Rent-seck not liable to seizure under fi. fa. lands.—*Dougall v. Turnbull*, 622.

FOREIGN CORPORATION.

State of New York Mutual Insurance Company—Foreign corporation, right to sue in Canada.—1. The plaintiffs were a company exist-

ing in, and chartered by the State of New York, for the purpose of carrying on the business of mutual insurance in the county of Genesee. Their charter provided that the company should have a lien by way of mortgage on the property insured, and upon the right, title and interest of the assured to the land on which such property stood. The defendant was a British subject residing in Canada, and the contract was entered into in Canada. *Held*, that the company, from the very nature and object of its charter, was incapable of carrying on its business in this province. *Genesee Mutual Insurance Company v. Westman*, 487.

2. *Quære*: Whether any foreign corporation can under its foreign charter assume to carry on business here, even of the description contemplated by its charter? *Ib.*

FOREIGN JUDGMENT.

See PLEADING, 18.

What action lies on.]—1. Assumpsit lies on foreign judgment. *McFarlane v. Derbyshire*, 12.

What is.]—2. All judgments are foreign judgments which are given by courts whose jurisdiction does not extend to the territories governed by our laws. *Ib.*

FOREIGN LEGISLATURE.

No power to make a law creating a lien on legal estate in Canada.]—*Genesee Mutual Insurance Company v. Westman*, 487.

FORMER RECOVERY.

See ACTION, 1.

FRAUDS (STATUTE OF.)

Debt of another—Common counts.]

—1. Where the defendant agreed that

if the plaintiff would give up his claim against A. B. for 46*l.* he would pay him 35*l.* out of the proceeds of a certain raft when it would arrive at Quebec: *Held per Cur.*, that the plaintiff could sue the defendant on such agreement upon the common counts, and without producing proof of the agreement in writing. *McDonald v. Glass*, 245.

Agreement not to be performed within a year.]—2. *Semble*: That under the facts of this case the objection, that the agreement upon which the plaintiff claimed a right to the use of the defendant's cattle was not one to be performed within a year, and so required under the Statute of Frauds to be evidenced by writing, was not tenable. *Sculer v. Haley*, 255.

GRAFTON ROAD COMPANY.

The Grafton Road Company have power, under 10 & 11 Vic. ch. 93, sec. 35, to make contracts by parol. *Turley v. Grafton Road Company*, 579.

GRANT.

Surveyor General's return of a lot as described for grant—Evidence to rebut this return—Effect of erroneous return, where land sold for taxes.]—When the surveyor general returns a lot of land, as described for grant, proof that the land was not in fact so described must be of a very positive and affirmative kind; the mere evidence of a clerk in the surveyor general's office that he finds no trace of it, will not do. *Perry v. Powell*, 251.

2. *Quære*: The effect of the surveyor general having in any case erroneously returned a lot of land as having been described for grant, when in fact it had never been so described; and when, in consequence of this error, the land has been charged with assess-

ments, and being returned in arrear has been sold? *Ib.*

GUARANTEE.

Attornies' liability to sheriff on a verbal guarantee.—1. Sheriffs recommended to take precise *written* engagements from attornies when they mean to hold them liable, in cases they have nothing to do with except professionally; though where the attorney has verbally agreed to indemnify, the Court, if the agreement is admitted, will enforce it. *In re Corbet v. O'Reilly*, in the case of *Macdonell v. Grainger*, 130.

Guarantee — Consideration — Necessity of acceptance.—2. *Held*, on the guarantee set out in the statement of this case: 1st. That it did not import a past consideration. 2ndly. That it was an actual guarantee, and not a mere proposal requiring acceptance to render it binding. 3rdly. That offering a mortgage subject to two prior mortgages, (which were given moreover after the guarantee), was not such a valid mortgage as the guarantee imported. *Jenkins v. Ruttan*, 625.

GUARDIAN.

See EJECTMENT, 2.

HEIR.

See PARTNERSHIP, 1.

Plaintiff in ejectment claiming as heir—Will spoken of by the plaintiff's witness, who to prove it.—The circumstance of its coming out on the cross examination of a witness of the lessor of the plaintiff claiming *as heir* that his ancestor left *a will*, does not disable the plaintiff from recovering as heir, until he produces or gives evidence of the will; it is for the defendant to shew the contents of the will. *Doe dem. Atkinson v. McLeod*, 344.

HIGHWAY.

12th clause of Highway Act, 50 Geo. III. ch. 1.—As to what constitutes a public road running through Indian lands.—The 12th clause of the Highway Act, 50 Geo. III. ch. 1, cannot be taken to mean that every bye-road, or short cut used by the Indians across the plains or flats, is to be established as a permanent highway; It only means that roads which under the provisions of that act are to acquire the charter of legal highways should have that same legal character, where they passed through Indian lands, as in other parts of their course, although they might not be (as to such portion of them) public allowances made in any original survey, nor had any public money been expended or statute labor performed on them. *Byrnes v. Bown*, 181.

IMPLIED PROMISE.

Where there is evidence of a loan or debt, of course a promise to repay it will be implied. *Hall v. Morley*, 584.

IMPROVEMENTS.

Damages for, not allowed.—Where the government for any purpose has ordered a re-survey of a concession, and the surveyor so employed has planted posts to mark his survey, and the defendant has settled on a lot as marked by this survey, the defendant in ejectment will not be entitled to *his improvements*, under the acts 59 Geo. III. ch. 14, and 2 Vic. ch. 17, if the jury find that the plaintiff is holding according to the posts planted at the front angles of his lot in the *original survey*. The defendant in such case cannot be said to have settled on the land in consequence of an unskilful survey. *Doe dem. Moule v. Campbell*, 19.

INDEMNITY BOND.

See PLEADING, 2.

What is no defence to.]—1. It is no defence to this action to shew that the sheriff, instead of paying the claim of the party indemnified against after he paid the execution creditor (the obligee in the bond to the sheriff), chose to pay the surplus proceeds of the sale to the assignee of the execution debtor, since a bankrupt, and so was damnified of his own wrong; the sheriff cannot be called upon to treat as valid, with respect to these parties, the very claim against which he has been indemnified. *Corbett, Sheriff, v. Wilson et al.*, 22.

Costs, sheriff may recover under.]—2. The sheriff, in an action of this kind, is entitled to recover from the obligee in the indemnity bond the costs for putting off the trial of the cause against himself, on account of the absence of a material witness. *Ib.*

INDIAN LANDS.

See HIGHWAY, 1.

INFANT.

See EJECTMENT, 2.

INSTRUMENT.

Words which pass no interest in land.]—See "Land."

INSURANCE.

See MONEY PAID, 2.—MARINE POLICY, 1.

Fire policy of insurance—Want of president's signature—Its effect.]—Under the 10th clause of the 6th Wm. IV. ch. 18, a policy of insurance of the Newcastle Mutual Fire Insurance Company, signed by the secretary, but not by the president, is invalid, and the company could not be directly

sued upon it—they could be compelled, however, upon the defect being noticed, to execute a valid policy of the proper date, and their by-law would estop from objecting that the policy was not in fact executed before the loss. *Perry and Perry v. Newcastle District Mutual Fire Insurance Company*, 363.

INTERLOCUTORY JUDGMENT.

Incipitur necessary in signing, and what it should be.]—See "Practice," 1

ISSUE.

Case for overflowing land by damming water back—What the issue on the pleadings.]—Case for damming back water on the plaintiff's land: *Held per Cur.*, that upon the pleadings (as given at length below) the issue was *not* whether a dam which had been two feet high was made by the defendant three feet high, or, being made by others of that height within twenty years, was wrongfully continued by him, *but* whether the prescriptive right, whatever it might be proved to be, had been exceeded within twenty years to the plaintiff's prejudice. *McNab v. Adamson*, 119.

JOINT STOCK COMPANY.

Road Act, 12 Vic. ch. 84.—Necessity of complying with conditions of act to entitle company to sue for calls.]—It is only when the conditions mentioned in the Road Act, 12 Vic. ch. 84, have been truly and in fact complied with, that the persons associated together can be incorporated, and sue (in the short form given by the act,) stockholders for the non-payment of calls; and *Held per Cur.*, that, upon the facts of this case, the plaintiffs, not having *bona fide* paid in the six per cent. on the capital sub-

scribed, or registered the certificate as the act required, could not sue the defendant as a corporate company under the act for the non-payment of calls upon his stock. *Niagara Falls Road Company v. Benson*; *Same v. Hamilton*, 307.

JUDGE.

Power of, at Nisi Prius.]—1. See "New Trial," 1.

Power to amend record at Nisi Prius.]—2. See "Record," 1.

JUDGE OF COUNTY COURT.

See MANDAMUS, 1.—COSTS, 3.

Power to extend time within which security for an appeal may be tendered under 12 Vic. ch. 66, sec. 11. *Ford v. Crabb*, 274.

JUDGMENT AS IN CASE OF NONSUIT.

Judgment as in case of nonsuit, for not going to trial, the defendant having himself objected to the notice of trial as irregular.]—Where the plaintiff made a mistake in his notice of trial, and the defendant, when he was too late to give a fresh notice of trial, pointed out the error and refused to waive the objection, and then, because the plaintiff did not go to trial, moved the court in banc. for judgment as in case of nonsuit; it was *Held per Cur.*, that the defendant being himself the immediate cause of the plaintiff not going to trial, he was not entitled to judgment as in case of a nonsuit. *Watson v. Strong*, 180.

JUDGMENT.

See VARIANCE, 1.—ESTOPPEL, 4.

Non obstante veredicto.]—1. Where there is nothing but a general verdict

for the defendant, and the plaintiff has no verdict on any issue, and has no damage given him by the jury, he cannot ask for judgment *non obstante*. *Kerr v. Straat and Bradshaw*, 82.

Registry of, binds lands.]—2. Under the operation of the 13th clause of our Registry Act, 9 Vic. ch. 34, lands are bound upon the registry of the judgment, the mistaken reference in the clause to the docketing of judgments in England being considered by the court a mere false illustration of what was plainly provided for before. *Doe dem. Dougall v. Fanning*, 106.

Entering up judgment on demurrer.]—3. See "Practice," 4.

JURISDICTION.

Officers of Her Majesty's ordnance—Their liability to be sued in our courts in their collective capacity.]—The officers of Her Majesty's ordnance, composing a department of the public service, existing in England, cannot at the common law be sued in our courts in this province in their collective capacity, for an alleged culpable negligence—the remedy against them for any wrong done by the orders or omissions of the board as a board, can only be by application to the Crown. *Lane v. Officers of the Ordinance*, 108.

JUSTICE OF PEACE.

Constable's admission that he had their warrant, no evidence against them.]—*Kalar v. Cornwall et al.*, 168

JURORS.

Affidavits of.]—Affidavits of jurors, as to what passed in the jury room, will not be heard. *Doe dem. J. S. Hagerman v. Strong and Young*, 291.

JURY.

As to time in striking special jury.]

—1. Where a defendant applies for a *special* jury, he must do so *in time* to permit of the jurors being summoned, otherwise the common jury will not be held to be superseded. *Clandinan v. Dickson et al.*, 281.

Who to strike.]—2. Our act 48 Geo. III. ch. 13, sec. 5, gives no authority to the *coroner* to summon a *special* jury; where the sheriff is interested, some indifferent person appointed by the court must strike the jury. *Ib.*

LANDLORD AND TENANT.

See SURRENDER.

Landlord having distrained, his right afterwards to claim goods as his own, when sued in trespass.]—A landlord, when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale. *Gibbs v. Crawford et al.*, 155.

LEASE.

See PROFERT, 1; PLEADING, 11; SURRENDER.

Surrender of lease—Statute of Frauds.]—1. The surrender of a term must, under the Statute of Frauds, be in writing, signed by the *party surrendering*, or it must be by act and operation of law. *Doe dem. Burr v. Denison*, 185.

When lease can be said to be surrendered by operation of law.]—2. The giving up and cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a circumstance, and a strong one, to be considered in connection with what was done further: *Held per Cur.*, that the subsequent conduct of the tenant in this case (as mentioned in the judgment of the court) must be taken to be, on

the principle of estoppel, an implied surrender of his lease. *Ib.*

LIBEL.

Sufficiency of inducement to support innuendo.]—1. In an action for libel, the plaintiff averred that she was the mother of one Edward J. Barker, and then complained that the defendant well knowing this, in order to defame her, published in his paper the libel in question, which she averred imported that she was the mother of an illegitimate child. The following were the words which she complained of as conveying this imputation:—"Of the Barkers—that was the name of his reputed father; what was his mother's, I either never knew or have forgot, but I know it was not Barker." The defendant demurred to the declaration, as not containing inducements sufficient to support such an innuendo: *Held per Cur.*, declaration good. *Anderson v. Stewart*, 243.

Variance between words charged and proved.]—2. The plaintiff sued for slander. The words charged were—"He stole wheat last winter." The words proved were—"He (the defendant) said he (the plaintiff) stole away the wheat in the night, and I was well aware of it, and could have put him in gaol for doing it:" *Held per Cur.*, that the words proved did not support the words charged. *McNaught v. Allen*, 304.

LICENSE.

Mandamus to compel magistrate to revoke a certificate of license refused—How such application should be made.]—Mandamus refused, which had been applied for, for the purpose of directing a magistrate to revoke a certificate granted by him at an adjourned Quarter Sessions, authorising the issue of a tavern license to A. B., for keeping a tavern in the township

of Vaughan, the said certificate of license having been granted in contravention of a by-law of the Municipal Council of Vaughan. *The Queen ex rel. Gamble v. Burnside & Morgan*, 263.

License pleaded—When it must be shewn to be under seal—When not.]
—2. *Semble*, that though a license given by the plaintiff to the defendant not under seal is insufficient to create an easement, yet that it may be sufficient, as a license, to prevent the plaintiff from recovering damages for the erection of a dam, as a wrongful act.—*Robinson v. Fetterly et al.*, 340.

LIEN.

See CONTRACT, 1.

Words which only create a charge, but do not pass any interest—“Hypothecate,” meaning of the term.]
—In an instrument under seal the words “And for securing, &c. the said P. P. doth hereby specially bind, oblige, mortgage and hypothecate the said piece or parcel of land,” &c. pass no interest; they only shew an intention to create a charge or lien. *Doe dem. Ross v. Papst*, 574.

LIMITATIONS, (STATUTE OF).

Commencement of suit—Ca. re. issued before six years not returned, alias ca. re. issued after.]
—1. *Quære*: Is the Statute of Limitations saved by a writ having been issued before the expiration of the six years, though the defendant was not served with such writ, but had been served with an *alias* writ issued *after* the six years had expired, and though the first writ had not been *returned* until *after* the six years had expired? *Holman v. Weller*, 292.

4 Wm. IV. ch. 1, sec. 16—*Possession held under erroneous idea as to boundary.*]
—2. Under the Statute of

Limitations, 4 Wm. IV. ch. 1, a possession inadvertently held under an erroneous impression as to *boundary*, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would by mere lapse of time ripen into a title. *Doe dem. Taylor et ux. v. Sexton*, 264.

Effect of acknowledgment in writing after twenty years have expired.]
—5. When twenty years have passed, without a written acknowledgment of title or payment of rent, the title is extinguished, and cannot be revived by an acknowledgment given afterwards. *McDonald (widow) v. McIntosh*, 388.

LUNATIC.

Cestui que use a lunatic.]
—See “Crown Grant,” 1.

MALICIOUS ARREST.

Case for—When arrest is irregular.]
—1. Where a plaintiff, in an action on the case for a malicious arrest, has been arrested, though irregularly, under color of a writ and in consequence of its having issued, he may maintain an action on the case as for an arrest made by the direction of the person who actually caused that writ to issue. *Thorne v. Mason*, 236.

Probable cause.]
—2. The mere fact that the defendant was told by one or two persons that they thought he would be justified in arresting the plaintiff, otherwise he would lose his debt, is not enough to enable the judge to rule absolutely at the trial in the defendant's favor. *Ib.*

MALICIOUS PROSECUTION.

Case of malicious prosecution—Evidence of malicious intention.]
—Case of malicious prosecution. Defendant lost a bird and saw it in plaintiff's

house, who refused to give it up. Defendant thereupon went to a magistrate and stated that he had lost a bird, either accidentally or that it had been feloniously taken away, and that he suspected it to be at plaintiff's house. The magistrate issued a search warrant, on which the plaintiff was brought before him and discharged, it appearing that no larceny was committed. At the trial plaintiff refused a nonsuit, and a verdict was directed for the defendant: *Held*, on rule nisi to set aside verdict, that there was no evidence of malicious intention, and rule discharged. *Lucy v. Smith*, 518.

MANDAMUS.

See LICENSE, 1.

To judge of county court, refused.]—Mandamus refused to compel the judge to approve of the security tendered, after the four days which he had given for such tender had expired. *Ford v. Crabb*, 274.

MARINE POLICY.

Marine policy—Interest assured—Abandonment—Total loss.]—Marine policy. A. having with B. (though B. was not named in the mortgage) a mortgage upon a vessel, insured her for 600*l.*; the vessel was wrecked and abandoned by the mortgagor, and the insurers sent their agent to take charge of her; the loss was proved to be equal to the amount of insurance: *Held per Cur.*, that A. had an interest in the vessel to the amount of the mortgage, and that the loss, under the circumstances being an actual total loss, requiring no notice of abandonment, the verdict for the plaintiff could not be disturbed. *Crawford v. St. Lawrence Insurance Company*, 135.

MAYOR.

Jurisdiction of.]—See "Conviction," 1.

MONEY HAD AND RECEIVED.

See PRINCIPAL AND AGENT, 1.

MONEY LENT.

Power to recover money lent, to liquidate debts to a company, for work and labor of a nature not warranted by their charter.]—*Held per Cur.*, that the plaintiff was not precluded from recovering money advanced to D. B. for the liquidation of liabilities incurred by D. B. to N. H. & D. Company, or from enforcing any security for its repayment, because that company, in such transactions, exceeded the power conferred on it by its charter. *Cayley v. McDonell et al.*, *Assignees of Bethune*, 454.

MONEY PAID.

Premium—Recovery of, when once paid.]—1. When a person has paid a sum of money to another, with a full knowledge of facts, he cannot sue for it back again, on the ground that he paid it in ignorance of the law resulting from those facts. *Perry et al. v. Newcastle F. I. Company*, 863.

A party, however, may recover back money which it is clear he must have paid in *forgetfulness* of certain facts, which had without doubt been known to him: *Held per Cur.*, that upon the state of facts mentioned in this case, the assured could not recover back from the underwriters the amount they had paid on their premium note. *Ib.*

MORTGAGE.

Cannot be pleaded as discharge because note given subsequently as additional security.]—1. *Bank U. C. v. Sherwood*, 116.

Effect of mortgage as to the mortgagee's right of possession.]—2. The common effect of a mortgage is to entitle the mortgagee to take possession

at any time, even before default, unless the right to remain in possession till default be reserved; and where this right has not been reserved and the mortgagor has died, the widow, holding in privity with his title, stands in no better position, with regard to her right to the possession, than her husband. *Doe on the several demises of John Mowat v. James Nickall and Caroline Smith*, 139.

Debt on mortgage for one instalment due—As to proviso in mortgage being in itself an undertaking to pay.]

—3. Though debt will not lie for one instalment of a large sum due by instalments, yet where the plaintiff sued the defendant in debt on mortgage, setting out, in the first place, the deed between the parties, with the proviso in it that if the defendants should pay 900*l.* in nine yearly instalments, they redeemed their land; and then a covenant of the defendant only to pay the 100*l.* sued for, without any reference to the money due by instalments: *Held per Cur.*, that upon these averments in the declaration, (the proviso being a mere defeasance, and not an express undertaking to pay the 900*l.* by annual instalments) debt would lie. *De Truyl v. McDonald & Piper*, 171.

What constitutes a valid mortgage.]

—5. *Doe Ross v. Papst*, 574.

Debt on.]—6. See "Debt."

MORTGAGOR.

Interest of, in marine policy.—See "Marine Policy," 1.

MUNICIPAL COUNCIL.

By-law — Alteration of road.]—

1. See "Road," 1.

As to debt lying against the township council for expense of a survey made under the 38 Geo. III. ch. 1.]—

1. *Held per Cur.*, that the Township Council of Hamilton, coming in the

place, under the 12 Vic. ch. 81, sec. 31, heads 26 and 31, of the trustees of the Newcastle District, in quarter sessions assembled, could not be held liable in debt to the surveyor, who had been appointed under the 38 Geo. III. ch. 1 to re-survey the township of Hamilton. *Roach v. Municipal Council of Hamilton*, 229.

Township Council Act, 12 Vic. ch. 81—Quo warranto—Right of relator to attack the existence of council by quo warranto in one proceeding against every member by name.]—

It is not permitted to a private relator, under our act 12 Vic. ch. 81, either to attack by writ of summons in the nature of a *quo warranto* the township council by name, upon grounds which, if sustained, must necessarily lead to a dissolution of the body, or to attack the whole council in one proceeding, through the individual names of every member of it. *The Queen ex rel. Lawrence v. Woodruff*, 336.

Quashing by-law of municipal council for the appropriation of money for roads—Entitling of rule nisi.]—4. Held per Cur., that the by-law passed by the Peterboro' Municipal Council under the provisions of our act 12 Vic. ch. 81, sec. 41, 11th and 16th heads, appropriating 600*l.* from the county funds of the County of Peterboro' to be expended on certain roads within the said county in such manner as may be deemed most proper by the commissioners appointed for that purpose, &c., is illegal, as exceeding the authority given to the council; and that the rule nisi for quashing it must be made absolute.

The entitling of the rule to quash the by-law of a municipal council need not be "The Queen v. The Council;" but, "as in the matter of A. B. and the Council." *In re W. S. Conger v. Peterboro' Municipal Council*, 349.

Township council proper plaintiff for a local debt due to the old district council.]—5. Under the 175th and 176th clauses of 12 Vic. ch. 81, the township councils, and not the county councils, are entitled to receive moneys due to the old district councils, where the debt is due to the *locality*, as for making roads in a township, &c.; and *Held, per Cur.*, that in this action the money sued for belonging to the township council, and not to the county council, the plaintiffs (the county council) must be nonsuited. *Municipal Council of the United Counties of Northumberland and Durham v. Bull and Meyers*, 375.

Power to open new roads.]—6. See Pleading, 22.

By-law—12 Vic. ch. 81, sec. 31, heads 31, 32—*Gananoque—Tax on dogs for improving streets*]—7. A municipal council, under 12 Vic. ch. 81, 31st head, has not power to appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township, to the improvements of the public streets, and to other purposes within the limits of such part of the township. *In re Richmond v. The Municipality of the Township of the Front of Leeds and Lansdowne*, 567.

NEW TRIAL.

See PRACTICE, 3.

Amendment of record at Nisi Prius—New trial granted.]—1. It is not competent to a judge sitting at Nisi Prius to allow a plaintiff to amend his record by filling up the proper day of Nisi Prius after the cause has been called on, and the jury called though not sworn; and when such amendment has been allowed the court will grant a *venire de novo*. *Doe dem. Bonner v. Burd*, 9.

Seemable, that had the application to amend been made in the following

term, the court might perhaps have allowed the amendment to have been made. *Ib.*

Where verdict for plaintiff just, but evidence did not support any count.]—2. Where the evidence does not strictly support any one count in the declaration, but a verdict has nevertheless been given for the plaintiff, in accordance with justice, the court may grant a new trial, allowing the plaintiff to amend. *Elliott et al. v. Croker et al.*, 156.

Unreasonable verdict.]—3. *Scouler v. Halcy*, 255.

New trial—Misdirection.]—4. The application for a new trial on the ground of misdirection must fail, when the alleged misdirection, as in this case, amounts only to this—that the learned judge, in charging the jury, did not advance a particular argument, which the counsel thinks would have influenced the jury in his client's favor. *Annable v. McDonnell et al.*, 382.

New trial refused to one of several defendants.]—5. Where a verdict has been found against one of several defendants and for the others, the court will not grant the former alone a new trial. *Davis v. Lennon et al.*, 599.

NON JOINDER.

As to the mode of taking advantage of the non joinder of a party to a bond—Plea in abatement—Demurrer to declaration.]—To take advantage of the non joinder of a co-contractor or joint obligor, the defendant must plead in abatement, shewing the party non-joined to be living and within the jurisdiction. A demurrer to the declaration, after setting out the bond on oyer, will not at all events, under our acts 59 Geo. III. ch. 25, 7 Wm. IV. ch. 3, sec. 6, bring up the point of non-joinder. *City of Toronto v. Shields and Coulter*, 133.

NONSUIT.

Plaintiff accepting nonsuit—His right to move against it in term.]— Where the judge at Nisi Prius is charging against a plaintiff, and the plaintiff in consequence of such charge (to which he objects) rather than risk a verdict accepts a nonsuit, he is nevertheless at liberty, in term, to move against the nonsuit. *Hatton v. Fish*, 177.

NOTICE.

See PRINCIPAL AND SURETY, 1.

*Of non-payment.]—*1. See "Bills of Exchange &c.," 3.

*By Municipal Council before opening road.]—*2. See "Pleading," 22.

*Sufficient compliance with agreement.]—*3. Where A. agreed to accept as notice actually given any which B. should mail, directed to A., it is a sufficient compliance with such agreement that a written notice is actually delivered to A., though not put into the post for him. *Morton v. Benjamin and Phippen*, 594.

NOTICE OF ACTION.

See VARIANCE, 2.

*Sufficiency of, as to time—4 & 5 Vic. ch. 3, sec. 6.]—*The defendant, a bailiff, was served with notice of action on the 28th of March, and on the 29th of April the writ was sued out: *Held per Cur.*, that the bailiff had at least one calendar month's notice of action, between the notice of action and the commencement of the suit. *McIntosh v. Vansteenburg and Keysar*, 248.

NOTICE OF TRIAL.

*Irregularity in.]—*1. See "Judgment as in case of Nonsuit," 1.

*Sufficiency of—Costs.]—*2. *Held per Cur.*, that the service of a notice of trial by putting the paper under the

door of the attorney's office, the attorney swearing that he was absent from home at the time, and did not return till the day of the assizes, when he first heard of such service, was irregular; and that the verdict must be set aside, but without costs, as the attorney should not have absented himself on the eve of the assizes. *The Grand River Navigation Co. v. John A. Wilkes*, 249.

*Irregular—Application to set aside.]—*3. The application to set aside the verdict—not the notice of trial or the service—is correct. *Ib.*

*Irregular—Waiver.]—*4. The offer by the defendant to refer the cause to arbitration, cannot be considered as a waiver of the irregularity. *Ib.*

ORDNANCE DEPARTMENT.

See JURISDICTION, 1.

OVERHOLDING TENANT.

*Disseizin.]—*A tenant holding over is in no case a disseizor. *Doe dem. Charles v. Cotton*, 313.

PARTNERSHIP.

*Partners—Equitable, and legal title.]—*Though a surviving partner may have an equitable title in lands, yet this does not make a demand of possession necessary on the part of the heir of the deceased partner suing in ejectment upon his ancestor's legal title. *Doe dem. Atkinson v. McLeod*, 344.

PATENT.

*Parol evidence of a patent.]—*A party who had lost his patent for land will not be allowed to give parol evidence of its contents; he must produce an exemplification of the patent. *McCollum v. Davis*, 150.

POWER.

See WILL 2.

PRACTICE.

See NONSUIT, 1.—COGNONRT, 1.

26th rule, Hil. Term, 13 Vic.—*Incipitur of declaration—Necessity of, in signing interlocutory judgment, and what it must contain.*—1. By the 26th rule of Hil. Term, 13 Vic., an *incipitur* of the declaration is necessary to the regular signing of interlocutory judgment, and such *incipitur* must be a true copy as far as it goes; where therefore the *venire* in the declaration was "District of Victoria," and the *venue* in the *incipitur* of the judgment roll was "County of Hastings," the court set the judgment aside as irregular. *Pace v. Meyers*, 70.

2. A plaintiff is not at liberty to go on and assess his damages, pending a summons to set aside his interlocutory judgment, and after it is returnable. *Ib.*

Evidence at Nisi Prius not objected to—Exception cannot be taken subsequently.—3. In an action of assumpsit, evidence was given at Nisi Prius of demurrage on more than one occasion, whereas there was only one count applicable to such detention; and only one instance complained of in it. No exception was taken to the evidence at the trial, and *held*, that it could not subsequently be urged in moving for new trial. *Campbell v. Beamish*, 526.

Judgment on demurrer—Irregularity in entering it up—Application to amend.—4. Judgment on demurrer cannot be entered while there are issues in fact undisposed of. *Waite v. McDonell*, 570.

Objections not duly taken at trial cannot be urged in term.—5. Although where a plaintiff by his own act has put it out of his power to sue on a contract, he cannot insist on prompt payment in an action on the

common counts, yet, where the objection that the time for exacting the last payment under the contract had not arrived when the writ in the cause was sued out was not made when the plaintiff closed his case, but merely by way of an objection to an observation made by the learned judge when charging to jury, the court will not admit the objection to be urged in term on a motion for a new trial. *Turley v. Grafton Road Company*, 579.

Quo warranto—Judge's order.—6. The judge's order is not defective because it does not award that a new election be held. *The Queen ex rel. Bartliffe v. O'Reilly*, 617.

PLEADING.

See BILLS OF EXCHANGE ETC., 11.—NONJOINDER, 1.—LANDLORD AND TENANT, 1.—DOWER.—LIBEL, 1. COVENANT, 4.—TROVER, 1.—EVIDENCE, 9, 11.—BOND, 2.

Declaration—Averments in.—1. The devisee of a grantee suing upon a breach of the grantor's covenant, that "the land was free from incumbrances," must aver in his declaration that the incumbrance was unsatisfied when the devisee took the estate. *Mauagan v. Fraser*, 11.

Indemnity bond—Plea—Sheriff damnified de son tort—Defence under.—2. Where to an action by the sheriff upon an indemnity bond, the defendant pleaded that the plaintiff was damnified of his own wrong, it was *held per Cur.*, that the defendant could not shew under this plea that the sheriff incurred the damages complained of, irrespective of the execution of the writ indemnified against. *Corbett, Sheriff v. Wilson et al.*, 22.

Covenant—Plea—Subsequent agreement not under seal—Effect of such agreement.—3. A. covenants under seal with B. that he will repay

B. on the 1st September 1847, any advances of cash and goods made by B. to C. (a lumberer on the Ottawa), *provided* the timber should not before then be sold and disposed of at Quebec. B. after the 1st of September 1847, sues A. upon this absolute covenant for the monies advanced to C. A. pleads that after this covenant was made, and after the monies were advanced, it was agreed between B. and C., that if C. would make the arrangement described in the plea, then B. would discharge A. from his covenant and all liability in respect thereof; it was then averred that C. did make the arrangement, whereby A. became wholly discharged from his agreement. *Held per Cur.*, that this plea being taken, either to set up in effect a parol agreement to discharge A. from his agreement under seal, (which the court seemed to think that it must be), or if not, to assert that such a consequence resulted from the facts stated, independent of the alleged agreement, could not in either case be considered a legal defence to the action. *McPherson et al. v. Dickson*, 29.

Trespass—Averment.—4. Plea of justification in action of trespass bad, for want of *direct and positive* averment that a felony had been committed. *McKenzie v. Gibson*, 100.

Replication to a plea of justification in trespass, denying the truth of the matter of justification and new assigning.—5. Where to a plea of justification to the trespasses charged, the plaintiff replied, 1st, that the defendant of his own wrong and without &c., and 2nd, new assigned as for trespasses on another and different occasion, &c., and it was *Held per Cur.*, on objection that the replication was bad for duplicity, replication good. *McKenzie v. Gibson*, 100.

Note—Plea—Accommodation and payment—Duplicity—Argumenta-

tive plea—Demurrer.—6. *Held per Cur.*, that these facts (given in the report), from the nature of the defence intended to be set up, were not double: also, that the 2nd was one of those cases in which a party might be allowed to plead specially such facts as might perhaps equally have availed him upon a denial in more general terms. *Hutchinson v. Munroe*, 103.

Pleading payment of a less sum in satisfaction of a judgment recovered for a greater sum, alleging the lesser sum to be the true debt.—7. To debt on judgment, a plea was pleaded in effect alleging that the judgment was entered upon a cognovit in which, though the nominal debt was admitted to be 200*l.* as sued for, the true debt was only 79*l.*, which sum was paid in satisfaction of the judgment: *Held*, on demurrer, plea bad. *Crooks v. Wilson*, 114.

In a defence like this, the proper course for the defendant to take is to apply to have satisfaction entered on the judgment, or to stay proceedings in the suit upon the judgment. Principles of pleading prevent the defence being urged in the shape of a plea. *Ib.*

Onus of proof, upon defendant pleading that he had a good right to convey.—8. Action of covenant, assigning as a breach that the defendant had not a good right to convey. The defendant pleaded that he had a good right to convey, and the plaintiff replied denying the right: *Held per Cur.*, that upon these pleadings, the onus of proving the affirmative of the issue lay on the defendant. *McCollum v. Davis*, 150.

Averment in declaration.—9. The averment in the declaration that in consideration that the plaintiff, at the request of the defendant, "would agree" not to put the said A. B. to costs in respect of his debt, he, the said defendant, promised, &c., is in effect the

same thing as averring that in consideration, &c., that the defendant *would not* put the said A. B. &c., the defendant promised, &c.; and *Held per Cur.*, that therefore the averment that he had put the said A. B. to costs, was sufficient. *Noad et al. v. Brown*, 154.

Argumentative plea—Lessor's acceptance of assignee of lease as tenant.]

—11. Where the lessee pleaded the assignment, and then averred the acceptance by the lessor from the assignee of the sum of 187*l.* 10*s.* not as the rent sued for in this action, but merely as "for the rent aforesaid, in form aforesaid, reserved and made payable:" *Held per Cur.*, that the plea was not argumentative, as setting up indirectly payment of the rent. *McCulloch v. Jarvis et al.*, 267.

Covenant for rent—Demurrer.]

12. See "Covenant," 4.

Declaration—Uncertainty of number of breaches relied on—Demurrer.]

—13. This declaration, being a special one on the case against a sheriff for breach of duty, was considered insufficient on demurrer, from the fault of uncertainty, not in any particular breach, but as to the number of breaches intended to be relied upon. *Reid v. Carrall*, 275.

Duplicity in declaration.]

—14. Duplicity is a good ground of exception to a declaration, as well as to a plea. *Ib.*

Deed—Execution of.]

—15. In order to raise an exception to the execution of a deed, the defendant should plead *non est factum*; he should not demur. *Burns v. Robertson*, 280.

Indorsement of note to a person unknown before action—Demurrer to replication.]

—16. To an action by the payee against the maker of a note, the defendant pleaded that before the commencement of this suit the plain-

tiff indorsed and delivered the said note upon and for a valuable consideration, to a person unknown to the defendant. *Replication*, that the plaintiff did not indorse and deliver the note upon and for a valuable consideration, in manner and form, &c.: *Held per Cur.*, on demurrer to replication, replication bad. *McIntyre v. Skead*, 300.

Assignment by bankrupt, before bankruptcy, of part of interest in bond

—*Who to sue, bankrupt assignee, or bankrupt.*]

—17. Where a bankrupt, thirty days before the commission issued, *bona fide* assigned part of his interest in a bond to A. B., (*viz.*, to 400*l.* when the bond was for 500*l.*); it was *held per Cur.*, that he (the bankrupt), and not the bankrupt's assignee, was the proper party to bring the suit for the interest A. B. had in the bond. *Hughes v. Newcastle District Mutual Fire Insurance Company*, 315.

Action on foreign judgment—Pleas to—Jurisdiction of foreign court over the persons of defendants, the cause of action, and to the natural justice of the judgment—Demurrer.]

—18. The defendants being sued in assumpsit upon a foreign judgment obtained in the State of New York, pleaded in three or four pleas a want of jurisdiction in the foreign court over their persons, they being British subjects resident in Upper Canada from and after the commencement of the suit; also, a want of jurisdiction over the cause of action; and also, that the facts alleged and proved in the proceedings in the foreign court, and set out in the 8th plea to this action, shewed that the judgment given there was contrary to natural justice: but *held per Cur.*, (Robinson, C. J., *dissentiente*), that the averments in the 4th, 5th and 8th pleas, as they now stand, were insufficient, to make the defences available. *Warrener et al. v. Kingsmill et al.*, 407.

Trespass—Evidence under pleas of not guilty, and goods not property of plaintiff.—19. See “Evidence,” 9.

Delivery of attorney's bill—Date laid under a scilicet—Replication—Demurrer.—20. Action against defendant, for services rendered as attorneys.—Plea, that though the plaintiffs did, before the commencement of this suit, to wit, on the 10th of September 1851, deliver to the defendant a bill of their fees, yet that a month from such delivery had not expired before the commencement of this suit.—Replication, that a month from the delivery of the bill in the plea mentioned had expired before the commencement of this suit: *Held per Cur.*, on demurres to replication, replication good. *Draper et al. v. Steen*, 441.

Note—Pleading—Partial failure of consideration.—21. A plea to an action upon a promissory note, shewing not a total, but only a partial failure of consideration, is bad. *Hill et al. v. Ryan*, 443.

Trespass—Pleading—Justification—12 Vic. ch. 81—13 & 14 Vic. ch. 64—*Demurrer.*—22. Trespass quare clausum fregit.—The defendants justified under a by-law passed by the Municipal Council of the township of King, under the authority of which they alleged that they entered for the purpose of opening a new road laid out on the plaintiff's land. The 3rd and 4th pleas, which are set out in substance in the statement of the case, were demurred to, among other causes: *Because*, the municipal council had no power to confirm or establish a public highway: *Because*, the plea did not aver any notice by the said corporation, before making the said by-law, as required by the statute: *Because*, the plea did not aver the laying out of the said road by a road surveyor, nor sufficiently describe the said road—where it ran, or at what point it com-

menced, and where it terminated—and because there is no averment that any by-law was made, under which the said R.W. assumed to survey, lay out, &c.: *Because*, the plea did not aver that the said road did not run through the garden, &c., of the plaintiff, and for want of averment of consent of owner in writing: *And because*, there is no averment of a reasonable time having been allowed plaintiff to open the said road, after passing of the said by-law, before the defendants committed the said trespasses. *Held per Cur.*, that the municipal corporation had power to open new roads through any persons lands, under the restrictions in the statute: *Held also*, that no notice of such road was necessary, the word opening being omitted in 12 Vic. ch. 81, sec. 192, and that 13 & 14 Vic. ch. 64, could not apply to this by-law: *Held also*, that the plea was bad in not directly averring that the surveyor had laid out a road through the plaintiff's land, which he reported on the 27th July, and that such road went through and over the locus in quo, and that the council confirmed that road: *And semble*, that it would not be sufficient for a surveyor to lay out a road through a man's land of his own accord, and then to report it to the council, to entitle the council to establish it as a road; but that the surveyor must act in consequence of a proper application or order: *Semble also*, that a by-law cannot be good which authorizes a road through a man's land without stating where it enters or what course it takes; and that the reference to the surveyor's report, without annexing it to the by-law, nor even averring that it is remaining among the records of the council, is not sufficient: *Semble also*, that the plea should have averred that the road was so laid out as not to run through or encroach upon any dwelling house, &c.; though it is not necessary that this should appear on

the face of the by-law: *Semble also*, that the mere passing of a by-law should not be considered *ipso facto* the opening of a road, but merely as authority to open it in a proper manner and after reasonable time given to all parties; that the plea is defective for neither stating that this was a wholly new road, nor (supposing it to be so) that notice was given, as would then be requisite. *But quære*: Whether averment of notice would be necessary in any case? *Held also*, that the by-law was bad for referring proprietors to private parties for compensation, which they had no power to do, and because it directs a passage under the road to be made by parties whom they have no means of compelling to do so: *Held also*, that a party is not necessarily restrained by the 155th sec. from bringing an action till the by-law has been quashed, for some of the objections would prevail even though the by-law were perfectly legal. *Dennis v. Hughes et al.*, 444.

Arrest — Plea — General demurrer.—23. The declaration was in covenant against the sheriff and his sureties, under 3 Wm. IV. ch. 8.—The 2nd breach stated in substance that the sheriff having received a writ of ca. re. to arrest one Tyler, a person without any authority from the sheriff arrested him; that Tyler went to the sheriff and gave a bail bond for his appearance, which the sheriff, not knowing but that the warrant authorized the arrest, took.—The 2nd plea to this breach stated that plaintiff having knowledge of this insisted, while the process was current, on the sheriff's making an effectual arrest.—General demurrer to plea, because the plea was no answer to the cause of action stated in the second breach. *Held*, on general demurrer, that this plea was no answer to the cause of action stated in the second breach. *McIntosh v. Jarvis et al.*, 530.

Customs-Averments.—24. Information for the condemnation of certain goods. The 1st count charged the unlading of goods before due entry, contrary to the form of the statute, &c. whereby they became forfeited: *Held*, 1st, that it was not necessary to aver that the unlading was for the purpose of avoiding the duties, nor that there was no sufferance; that the meaning of the statute is, that as goods shall be unladen *without entry*, nor *after entry*, except at some place where an officer is appointed. *The Queen ex rel. Attorney General v. Brunskill*, 546.

Customs—Necessary allegation of fraud.—25. The 2nd count charged that the goods were not truly described in the entry for duty, *in this*, that the value for the duty stated in the entry was not the actual cash value in the markets in the country where the importer purchased them, without adding that such untrue description and undervaluation was made with intent to evade the payment of duty: *Held, also*, 2nd count bad, for that the mode of calculating the value for duty as required by 12 Vic. ch. 1 sec. 6 not being complied with, was in itself no ground, without the further allegation of design to evade the payment of forfeiture under 10 & 11 Vic. ch. 31, sec. 18. *Ib.*

What constitutes duplicity.—26. Duplicity in a count consists in supporting the same claim on several distinct grounds, not in laying several injuries in one count. A count in case, therefore, for maliciously seizing a horse of large value as a distress for a very small sum, when there were other chattels of smaller value which might have been taken, with an averment, *also*, that the defendant afterwards sold the horse for much less than he was worth, is not bad for duplicity. *Higson v. Thompson*, 561.

*Setting out will—Averments.]—*27. In setting out a will in pleading there is no necessity to aver that all the solemnities of the statute have been observed in regard to the execution of the will; the averment that the will was made and published as by law is required for the passing of real estate, is sufficient. *Walton v. Hill*, 562.

*Non Tenuit.]—*28. See "Evidence."

*Bond—Condition—Declaration—Demurrer—Vague description of land.]—*29. Debt on bond; condition that the obligor was to make a good and sufficient deed, free and clear, &c., but omitting the name of the obligee, and not stating the term or time the deed was to be made. The defendant demurred for these causes to the declaration: *Held*, that though the name of the obligee was omitted, it must be intended that the land was to be conveyed to him: *Held also*, that in the absence of any qualification or limitation to his undertaking, defendant's meaning would be taken to be, that he would give an absolute title: *Held also*, that the description of the land, though too vague to shew on the face of the instrument where the land must lie, was yet sufficient to enable it to be ascertained on the ground, or by a jury. *Cæsar v. Norton*, 587.

*Obligor of bond need not plead fraud.]—*30. *Held*, that the obligor of a bond which, by the plaintiff's own shewing, is clearly fraudulent, need not plead fraud, to prevent a recovery on it. *Smith v. Dittrich*, 589.

*Trespass—Pleading—Necessary allegations—*12 Vic. ch. 87, secs. 1 & 5.]—31. Trespass for breaking &c. mill-dams. *Plea*, that the said mill-dams &c. were erected &c. in and across a certain stream &c., down which said stream &c. and at the respective places &c. lumber and saw-logs are usually brought and have been

so brought for a long time, to wit, for the space of twenty-five years; and that the said dams &c. were not constructed with an apron or slide sufficient &c., according to the statute &c., and because the said dams &c. had not said aprons or slides &c.; and because the said saw-logs could not otherwise &c. be brought down the said stream &c., therefore the defendants committed the said trespasses &c., for the purpose &c.: *Held*, on demurrer, plea bad; 1st. because it did not sufficiently shew the said stream to be a navigable river, and as such a public highway, not alleging that it had been used of right for passing timber, nor putting it on the ground of immemorial usage; 2nd. That the plea should have expressly averred that there was no gate or lock, or opening, in the dams, through which &c.: *Held also*, that the mentioning of freshets in the statute was only for the purpose of shewing that streams should be free from obstruction, even though they could be used for such purposes only in times of freshet. *Shipman v. Clothier et al.* 592.

*Excess.]—*32. Excess must be replied. *Davis v. Lumon et al.* 599.

*Promissory note—Pleading.]—*33. Declaration, payee against maker of a promissory note; *Plea*, note made for plaintiff's accommodation without consideration; *Replication*, that note was not made for plaintiff's accommodation without consideration, nor does he still hold the same without value, &c.; *Demurrer*, because the replication does not shew what the consideration was: *Held per Cur.*, *Replication* good. *Graveley v. Jones*, 606.

*Pleading—Who proper plaintiff and defendant—*12 Vic. ch. 78, sss. 6, 20, 37; 12 Vic. ch. 8, secs. 174, 175.]—34. The testator having been appointed by the finance committee of the district council to collect the wild

land tax: *Held*, that his representatives were liable to the council for money received by their authority and not paid over. Where, subsequently to the commencement of the action, one of the three united counties had been set off from the other two, *Held*, that the municipal council of the three united counties were the proper plaintiffs to bring the action. *Municipal Council of Lincoln, Welland & Hal-dimand v. Thompson et al., Executors, &c*, 615.

Declaration—Demurrer—Necessary averments.]—35. The declaration (which is set out in substance in the report) was held insufficient:—1st. Because there was no averment that the sheriff seized before the return of the writ of *fi. fa.* against lands; 2nd. That it not appearing that the said rent was anything more than a mere rent-seck, it would not be liable to seizure under a *fi. fa.* lands. *Dougall v. Turnbull*, 622.

PRESCRIPTION.

See EASEMENT., 1.

PRIOR ACTION.

See ACTION, 1.

PRINCIPAL AND AGENT.

Debt due by principal to agent, how to be made available by agent when sued by principal for money received.]—An agent, if sued by his principal for money received, cannot deduct in the first instance from such money a claim for money lent, or for any independent transaction between himself and his principal—treating the balance as the only sum held for the use of the plaintiff—but he must plead his demand by way of set-off against his gross receipts.—*Hamilton v. Street*, 124.

PRINCIPAL AND SURETY.

See EVIDENCE, 4.

Sufficient proof of notice to principal to bind surety.]—Where the principal, by repeating the contents of a notice, shews clearly thereby that the notice must have been received by him, this is sufficient proof of notice to bind the surety. *Morton v. Benjamin and Phippen*, 594

Notice sufficient under agreement to bind surety.]—2. Before the defendants became guarantee for A., notice had been given him to send the lumber required, specifying the quantity and quality thereof. After they gave their guarantee, he was also distinctly notified to send in the lumber which had been previously specified. *Held*, that such notice was sufficient to bind the sureties, and that it was not necessary that the particular kind of lumber required should have been expressed in the notice given subsequently to their having given their guarantee. *Ib.*

PROFERT.

Assignment of lease—Profert.]—A lessee sued in debt for rent, and pleading an assignment and acceptance of the rent by the lessor from the assignee, need not make profert of the deed of assignment. *McCulloch v. Jarvis et al.*, 267.

PROTEST.

See BILLS OF EXCHANGE, ETC., 12.

QUO WARRANTO.

See MUNICIPAL COUNCIL, 3; PRACTICE, 6.

Interest of Relator.] A relator is not necessarily bound to prove his interest unless the defendant question it by denying it, and shewing—or at

least alleging, some ground for his denial. *The Queen ex rel. Bartliffe v. O'Reilly*, 617.

RECOGNIZANCE.

See VENUE, 1.

RECORD (NISI PRIUS).

See VENUE, 1.

Amendment of.]—See “New Trial,” 1; “Venue,” 1.

Amendment of, at Nisi Prius.]—1. The judge at Nisi Prius cannot, by our act 8 Vic. ch. 13, secs. 51, 53, 55, amend the record by adding a new count to the declaration, supporting the action in another way, but abandoning nothing that had been before stated. In this case, which was tried in the county court under a writ of trial, the judge allowed the record to be amended by adding a count excusing the non-presentment of a note to the maker—the declaration having averred its presentment: but, *Held per Cur.*, that the judge below was wrong, and that there must be a new trial without costs. *Brown et al. v. Boulton*, 385.

Amendment of Record of Nisi Prius—7 Wm. IV. ch. 3, sec. 157.]—Debt on an annuity deed. At the trial at Nisi Prius the defendant was allowed to amend his pleas of usury as to sums and dates: *Held*, that the amendments were rightly allowed, being such as came within the statute. *Wright v. Marralls*, 511.

REGISTRY.

See JUDGMENT, 2.

RENT.

See FIERI FACIAS.

Quære: Does a rent charge come under the statute 5 Geo. II. ch. 7, sec. 4? *Dougall v. Turnbull*, 622.

ROAD.

See RIGHT OF WAY, 1.

Alteration of roads—By-law of municipal council—12 Vic. ch. 81, secs. 31, 189.]—1. A municipal council, in passing a by-law for the alteration of an old road, described the point of commencement as being *about eight chains* south of N. W. corner. The Court held that, in the absence of any ground for exceeding or coming short of the *eight chains*, the road was to commence at a point *eight chains* south &c.; and that the objection of the uncertainty of the point of departure of the road was not an objection sufficiently strong to warrant them in setting aside the by-law; but *held*, that the by-law was bad for not assigning *any width* to the new road, and it was therefore set aside, but without costs. *In re Smith v. Municipal Council of Euphemia*, 222.

Opening of—Surveyor's report—Description of, &c.]—2. See “Pleading,” 22.

RIGHT OF WAY.

See EVIDENCE, 1.

Public road—How far gate thrown across it is conclusive as to the road being abolished.]—The placing a gate across a travelled road, after the public have been enjoying it for upwards of twenty years, can never have the effect of abolishing a highway. *Johnston the younger v. Boyle*, 142.

RULE OF COURT.

26 Hilary Term, 13 Vic.]—See “Practice,” 1, 2.

Rule of Court, Mich. Term, 1850.]—617.

SALE.

*Goods transferred by instrument in writing to vendee—As to proof of the instrument.]—*Where goods have been transferred to the vendee by an instrument in writing, the vendor remaining as before the sale in possession, the vendee, to prove his title to the goods, must produce the writing, and, if witnessed, the subscribing witness. *Caldwell v. Green et al.*, 327.

SET OFF.

See PRINCIPAL AND AGENT, 1.

*What not allowed as—Statute of Limitations.]—*Where there is no plea of set off on the record, the defendant cannot have the advantage of any mere items of set off, not being *payments* on account, which the plaintiff has admitted in his particulars of demand; and where part of the plaintiff's own demands, stated in his particulars, are barred by the Statute of Limitations, he has a right to place against these the items of set off appearing in his particulars to be beyond the six years. *Ford et al. Executors, &c. v. Spafford*, 17.

SHERIFF.

See INDEMNITY BOND, 1, 2.

*Bill of sale executed to creditor—Sheriff not liable for not seizing goods under subsequent writ.]—*1. On the 18th of May the sheriff received A.'s writ of *plu. fi. fa.* against B.'s goods, returnable on the 11th of June (Easter Term), upon which the goods were seized.—On the 1st of June following B. made a bill of sale to A., leaving out however a few small articles, of which no notice had been given to the sheriff.—On the 27th of July C.'s writ of *fi. fa.* against B.'s goods was received by the sheriff: *Held per Cur.*, that upon these facts, supposing the bill of sale to be *bona fide*, C. had

no right of action against the sheriff for not seizing B.'s goods under his writ. *Held also*, that the direction of the learned judge to the jury to enquire if the bill of sale was made for valuable consideration and *bona fide* intended to pass the property, or whether it was merely colorable, of which secrecy and the absence of change of visible possession and ownership afforded indications, and that if they sustained the bill of sale as valid, it operated as a satisfaction and discharge of A.'s *fi. fa.* from the day of its execution, and that then the plaintiff (C.) must fail on his first count, alleging the seizure of A.'s goods under C's writ, and that the only question would be on the second count for not seizing the articles omitted from the bill of sale, as to which they were told that in the absence of any direct notice to, or knowledge in the sheriff of such goods, they must say whether he had as to them been guilty of any want of reasonable diligence in the execution of the plaintiff's (C.'s) writ, was correct, and that the finding of the jury in the sheriff's favor could not be disturbed. *Darling et al. v. Corbett, sheriff*, 72.

*Advised to take written guarantees from attornies.]—*2. *In re Corbett v. O'Reilly & Co.*, 130.

*Case against sheriff for false return to fi. fa.—What due diligence in sheriff trying to execute writ.]—*3. *Held per Cur.*, refusing to disturb the verdict in this case in favor of the sheriff, who had been sued in case for a false return to a writ of *fieri facias*, that the sheriff could not be said, either in law or in fact, to have been guilty of culpable negligence in not executing the writ; he had tried *several* times before the return day to execute the writ, but could not gain admittance to the house, and the Chief Justice said he could not hold that a sheriff was bound to keep sentinel day and night

at a defendant's house, for several days or weeks in succession; he was bound to exercise due diligence, and whether he had done so or not was a question for the jury to decide. *Finnigan v. Jarvis, sheriff*, 210.

Sheriff and his sureties' liability on his covenant for a wilful misconduct in returning nulla bona.]—4. *Held per Cur.*, that the returning of *nulla bona* by the sheriff, under the circumstances of this case (as fully reported) to the plaintiff's writ, was that kind of wilful misconduct on his part which gave a right of action under the covenant entered into by the sheriff and his sureties. *Clandinan v. Dickson et al.*, 281.

Attachment for non-payment of money.]—5. When the sheriff, upon an *attachment* to enforce payment of money, has the party in custody at the return of the writ, he must keep him safely in custody *after* the return of the writ, and until he is legally discharged. *Savage v. Jarvis, sheriff*, 331.

Liability of sheriff for an escape, after return day of writ—Case—Damages.]—6. In case of involuntary escape, where *case* is brought, and it is shewn that the creditor has in fact lost nothing, the jury need not give substantial damages; but where the sheriff *voluntarily* lets the party who is in execution go, the jury should be told that it is proper to give damages to the amount of the debt, especially when it is not so large as to justify the assumption that it would not be paid under the pressure of coercion, even though *the debtor may have no visible property*. *Ib.*

How far bound by warranty given by deputy, without his knowledge.]—7. *Semble*: That the *deputy sheriff* cannot, in any sale of property in execution, bind the *sheriff*, by giving, of his own accord, a warranty that the

goods belonged to the debtor in the *fi. fa.*—(Draper, *J. dubitante.*)—The deputy sheriff would be clearly liable himself on such a warranty. *Mink v. Jarvis, sheriff &c.*, 397.

3 Wm. IV. ch. 8—*what not wilful or negligent misconduct, within meaning of the act.*]—8. The declaration was in covenant against the sheriff and his sureties, under 3 Wm. IV. ch. 8. The 2nd breach stated in substance that the sheriff having received a writ of *ca. re.* to arrest one Tyler, a person without any authority from the sheriff arrested him; that Tyler went to the sheriff and gave a bail bond for his appearance, which the sheriff, not knowing but that the warrant authorized the arrest, took. But *held*, that this breach did not constitute such *wilful misconduct* on the part of the sheriff as to enable the plaintiff to sustain an action against him and his sureties under 3 Wm. IV. ch. 8. *Quære*: Whether under the circumstances, the court would not hold the bail precluded from denying an arrest. *McIntosh v. Jarvis et al.*, 530.

Power of sheriff to arrest a second time while process current, first arrest having been set aside as a nullity.]—9. A writ of *ca. re.* having issued to the sheriff to arrest one Tyler, a warrant was thereupon made to one G. a sheriff's officer to execute it. G. being unwell, put it into the hands of another bailiff, whose name did not appear in the warrant, and he went to Tyler and told him that he had a warrant to arrest him. Tyler promised to go to the sheriff's office and give bail, which he did. Subsequently, Tyler's attorney discovered that the name of the second bailiff was not in the warrant, and applied to the judge of the county court to set aside the arrest, who did so. Plaintiff's attorney then suggested to the officer that he should have a proper warrant made out and arrest Tyler while the process

was still current. The warrant was made out and Tyler arrested. Thereupon Tyler's attorney applied to judge of county court to set aside this arrest as vexatious, on the ground of its being a second arrest in the same cause of action, made without leave of the court. Tyler was discharged and subsequently left the province. Plaintiff brings covenant against the sheriff and his sureties. The 1st breach charges that the sheriff neglected to arrest Tyler, &c.: the 3rd breach states as a cause of action that sheriff arrested Tyler a second time without leave of court, after first arrest was set aside; that Tyler applied to have second arrest set aside, and that plaintiff was put to great loss and trouble in opposing the application &c., and therefore was guilty of wilful misconduct in his office. Pleas—4th to 1st breach, that defendant did arrest Tyler: 1st to 3rd breach, arrest made by authority &c. of plaintiff. Replication to this, that plaintiff did *recommend* said arrest for defendant's own benefit, but traverses the *command*. At the trial a verdict was found for plaintiff on all the issues, except that on plea to 1st breach, which was agreed to be submitted to the opinion of the court. *Held*, that defendant was entitled to succeed on the issue taken on the 4th plea to 1st breach, for when the first arrest was set aside as a nullity the sheriff might still arrest while the process was current. *Semle*: That first arrest was unnecessarily set aside. *McIntosh v. Jarvis et al.*, 535.

Wilful misconduct.—10. *Held*, that the defendants were entitled to succeed on the issue joined on the 1st plea to the 3rd breach, the evidence shewing that what was complained of as *wilful misconduct* on the part of the sheriff was done at the plaintiff's own suggestion. *McIntosh v. Jarvis*, 535.

E*

SHIP REGISTRY ACT.

Application of 8 Vic. ch. 5, to boats mortgaged before passing thereof.—*Held*, that plaintiff was not prevented from asserting his right by anything in the Ship Registry Act, 8 Vic. ch. 5. *Cayley v. McDonell et al., Assignees of Bethune*, 454.

SLANDER.

See LIBEL.

STATUTES, (CONSTRUCTION OF).

- 21 Hen. VIII. ch. 4—Executors, &c., 224.
- 27 Hen. VIII. ch. 10—Uses, 55.
- 13 Eliz. ch. 5—Fraudulent Conveyances, 215.
- 3 Jac. I. ch. 7—Attornies' Bills, 262.
- 21 Jac. I. ch. 16—Limitations, 17, 202.
- 22 & 23 Car. II. ch. 9—Costs of Suit, Certificate of Judge, 324.
- 29 Car. II. ch. 3—Frauds, 187.
- 2 Geo. II. ch. 23—Attornies' Bills, 262.
- 5 Geo. II. ch. 7—Debts in the Colonies, 622.
- 12 Geo. II. ch. 13—Attornies' Bills, 262.
- 24 Geo. II. ch. 44—Justices of Peace, Constables, &c., 168, 502.
- 38 Geo. III. ch. 1—Survey, 229.
- 48 Geo. III. ch. 13—Special Jury, 281.
- 50 Geo. III. ch. 1—Highway Act, 181.
- 59 Geo. III. ch. 14—Erroneous Survey, 19, 147.
- 59 Geo. III. ch. 25—Non-joinder, 133.
- 2 Geo. IV. ch. 1—Bailable Process, 560.
- 8 Geo. IV. ch. 6—Controverted Elections, 344.
- 3 Wm. IV. ch. 8—Sheriff, 281.
- 3 & 4 Wm. IV. ch. 59—Customs (Imp. Stat.) 220.
- 4 Wm. IV. ch. I—Limitations, 264, 238.
- 4. Wm. IV. ch. 4—Petty Trespass, 260.
- 6 Wm. IV. ch. 18—Mutual Insurance Companies, 363.
- 7 Wm. IV. ch. 3—Non-joinder, 133.
- 2 Vic. ch. 17—Improvements, 19, 147.
- 4 & 5 Vic. ch. 3—Small debts, 248.
- 4 & 5 Vic. ch. 10—Municipal Councils, 229, 596.
- 4 & 5 Vic. ch. 26—Malicious Injuries to Property, 260.
- 7 Vic. ch. 4—Notary Public, 242.
- 8 Vic. ch. 5—Ship Registry Act, 455.
- 8 Vic. ch. 13—District Courts, 385.
- 9 Vic. ch. 34—Registry Act, 166, 224.
- 9 Vic. ch. 75—Incorporation of City of Kingston, 617.

10 & 11 Vic. ch. 5—Prescription Act, 318.
 10 & 11 Vic. ch. 31—Customs, 230, 546.
 10 & 11 Vic. ch. 93—Cobourg & Grafton Road Company, 579.
 12 Vic. ch. 1—Customs, 546.
 12 Vic. ch. 35—Survey of Lands, 259.
 12 Vic. ch. 63, Bailable Process, 560.
 12 Vic. ch. 78—Union of Counties, 375, 579, 615.
 12 Vic. ch. 80—Repeal of Municipal Acts, 617.
 12 Vic. ch. 81—Municipal Councils, 222, 229, 232, 260, 336, 349, 375, 444, 615, 617,
 12 Vic. ch. 84—Road Act, 307.
 12 Vic. ch. 87, Mill Dams, 592.
 12 Vic. ch. 64—Amendment of 12 Vic. ch. 81, 444, 617.

SURETY.

See EVIDENCE, 4.

Liability of deputy's surety to treasurer of Western District—Its extent, as depending on the change in the treasurer's mode of appointment to office.]—A. became surety to B., the treasurer of the United Counties of Essex, &c. for the due accounting &c. by C., as deputy treasurer, while he B. continued in his said office. C. received moneys for which he did not account, and B. sued A. upon the bond. B. held his commission as treasurer from the government, from the execution of the bond to the 10th October 1846; and from that time to the 16th of August 1849, in consequence of a change made in the mode of appointment, he held his office under an election of the municipal council of the Western District: Held per Cur., upon these facts, that B. could sustain his action against the surety A., 1st, without proof in the first instance that he had actually paid the money himself which his deputy C. had mis-spent; and, 2ndly, that the surety was liable during the whole time the deputy was serving in the treasurer's office, without reference to the mode of the treasurer's appointment. Jean B. Baby v. Charles Baby, 76.

SURRENDER.

See LEASE, 1, 2.

Lease—Surrender in law.]—1. Where a tenant, with the knowledge and consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law of the lease; the relation of landlord and tenant no longer exists, and consequently the right to distrain is gone. Lewis v. Brooks. 576.

2. The provincial statute 12 Vic. ch. 71, does not alter the law as far as regards a surrender in law. *Ib.*

SURVEY.

Consequences of erroneous survey.]—1. See "Improvements," 1. Expenses for, how recovered.]—2. Roach v. Municipal Council of Hamilton, 229.

SURVEYOR GENERAL.

See GRANT, 1.

TAXES.

Land sold for, where erroneously returned as described for grant.]—Perry v. Powell, 251.

TITLE.

See COVENANT, 3, 6.

Defendant prevented from setting up adverse title by his own act.]—Doe dem. Boulton v. Walker, 571.

TOWNSHIP COUNCIL.

See MUNICIPAL COUNCIL, 5.

TRESPASS.

See CASE; EVIDENCE; LANDLORD AND TENANT, 1.

Evidence under pleas of not guilty and goods not property of plaintiff.]

—1. See "Evidence," 9.

Trespass for breaking &c. mill-dam.]

—2. See "Pleading," 31.

TROVER.

See ESTOPPEL, 2.

Omission of "licet scapius requisitus."]—1. The omission of the "*licet scapius requisitus*" in the common count for trover, is no ground for a special demurrer.—*Reid v. Carrall*, 275.

Sustainable on the facts.]—On 27th July 1843, D. B. mortgaged certain steamboats to the N. H. & D. Co. and plaintiff (who was also president of said company)—covenant by D. B. to pay, &c.—that in default, N. H. & D. Co. and plaintiff may take possession; on default to extent of 5000*l.* N. H. & D. Co. and plaintiff may sell.

On 12th August 1843, N. H. & D. Co. assigned their interest in the above mortgage to plaintiff.

On 13th May 1846, plaintiff conveyed to B. U. C. all his interest in the mortgage of 27th July 1843, and in the assignment to himself of 13th August 1843, stipulating at the same time for the return of the boats to himself in the event of the claim of B. U. C. being satisfied.

On 29th August 1843, plaintiff joined D. B. in a bond to C. G., which bond C. G. subsequently assigned to B. U. C., and plaintiff is now liable to B. U. C. by means of this bond, on account of D. B., for about 3008*l.* 8*s.*, and plaintiff is liable to B. U. C. on account of D. B. within the terms of the mortgage of 27th July 1843 in the sum of 3636*l.* 3*s.* 2*d.*

On 20th May 1847, D. B. mortgaged some steamboats and others to B. U. C., and on 27th March 1850, B. U. C., by indenture between them and the now defendants, came to an arrangement for the sale of all these boats to a company composed of D. B. and others, on certain conditions set out in the conveyance; and in a deed dated 15th August 1850, founded on this arrangement, between B. U. C. of the first part, these defendants, as assignees of D. B. of second part, and D. B. & Co. of the third part, it is recited that the B. U. C. claimed these steamers under the mortgage of 27th July 1843 (assigned to them on the 13th May 1846), and under certain mortgages given to them by D. B., and also under the mortgage to Commercial Bank, which had been assigned to them, and that these defendants, as assignees, claimed these boats, *notwithstanding the said mortgages, and contesting the validity of them*, and by this instrument Bank U. C. and these defendants, as assignees, &c. to the extent of their respective interests in the said steamboats, bargained, sold, &c. Also, on the 12th of July 1843, N. H. & D. Co., being indebted to Bank U. C., granted, bargained, &c. to C. C., Esq., his heirs and assigns, all the property in the front of the town of Niagara, belonging to said company, in trust, to receive rents, &c., to pay all notes, &c. of what kind soever due to the Bank U. C. from said company, and also all drafts, &c. of the individual directors discounted by Bank U. C. for benefit of said company. None of the debt transferred by D. B. to Bank U. C. was represented by notes. *Held*, 1st, (per Draper J. and Burns J.) that on these facts plaintiff could sustain an action of trover against defendants. Robinson, C. J., dissentiente, who considered that defendants, as assignees, &c. by the deed of 15th August 1850, intended to convey to D. B. & Co.

only such equitable interest as vested in them as assignees of D. B., and that therefore they were guilty of no conversion. *Cayley v. McDonell et al., Assignees of Bethune*, 454.

USES AND TRUSTS.

Cestui que use a lunatic—How far use executed in his heir after lunatic's death.—See "Crown Grant," 1.

USER.

See EASEMENT, 1.

USURY.

Redeemable annuity deed—Usury.—*Held*, that from the terms of the annuity deed the transaction could not be regarded as a *bona fide* purchase of a life annuity; but a contract for a loan of money under the appearance of buying an annuity, and therefore invalid as for usury. *Wright v. Marralls*, 511.

VENDOR AND PURCHASER.

See WARRANTY, 1.

VENIRE DE NOVO.

See NEW TRIAL, 1.

VENUE.

Recognizance—In what county to be sued upon.—A recognizance, set out as having been entered into in open court in Toronto, and remaining of record in Toronto, cannot be sued upon out of the county of York, where the record is. *Smith v. Russel*, 387.

VARIANCE.

Variance between judgment in ejectment, as pleaded and produced.—1.

Held per Cur., that in this action of trespass for mesne profits, the variances between the judgment in ejectment, pleaded as an estoppel to the plea of *liberum tenementum*, and the one produced, were fatal, and that the plaintiff had not verified the record pleaded. *Garrion v. Woodruff*, 328.

Notice of action under 24 Geo. III. ch. 44.—2. In the notice of action to a justice of the peace, under 24 Geo. III. ch. 44, the date of the warrant as stated in the notice, varied from the date as proved: *Held*, that such a variance was not fatal. In the notice the warrant was stated to have been directed to William Thompson, where it was really directed to William H. Thompson: *Held*, not a fatal variance. The warrant directed Thompson to levy the sum of 1l. 11s. 6d. *together with the charges of distress and sale.* The notice described the warrant as one directing Thompson to levy a certain large sum of money, *to wit*, the sum of 4l.: *Held*, no variance. *Higson v. Ward*, 502.

VERDICT.

1. Plaintiff having no verdict found for him on any issue, cannot ask for judgment *non obstante*. *Kerr v. Street and Bradshaw*, 82.

Verdict in one action inconsistent with that of former action.—2. Where a verdict in one action establishes a conclusion directly inconsistent with the result of a former action, yet where the evidence is conflicting the court have no right to insist on the verdict being found in the second as in the first action. *Doe dem. Burr v. Denison*, 610.

WAIVER.

See NOTICE OF TRIAL, 4.

WARRANTY.

See SHERIFF, 7.

Implied warranty by seller, of his own manufactured article.]—1. A person manufacturing an article in his own particular line, (such as a portable threshing machine), must be taken, contrary to the general principle as between vendor and vendee, *impliedly* to warrant that the article should be made in proper and workmanlike manner, and be fit for doing what was expected of it. *Grant v. Cadwell*, 161.

After sale.]—2. A warranty made after sale, without a new consideration, is not binding. *Ib.*

WIDOW.

Right to possession of premises mortgaged by her husband.]—See "Mortgage," 2.

WILL.

Registration of.]—1. Under the statute 9 Vic. ch. 34, the objection that the will was not registered within six months after death of testatrix, nor previous to a conveyance by the heir at law, is not valid, when the person

taking such conveyance is not a *bona fide* purchaser for valuable consideration, nor where, when the will was made, the title was not a registered title. *Doe dem. Ellis v. McGill*, 224.

Construction of—Power of wife to dispose of fee.]—2. Where the testator gave to his wife certain land, *to be at her disposal during her natural life*, the Court *held*, that the wife had the absolute power, during her life, of disposing of the estate by any conveyance in fee or otherwise. *Doe dem. Anderson v. Hamilton*, 302.

WORK AND LABOR.

See CONTRACT, 2.

Effect of recovery for part of value of work.]—*Semble*: That a recovery in an action on the common counts for work and labor, or for any part of the value of the work, would be taken to preclude any other action for the same work. *Turley v. Grafton Road Company*, 579.

WRIT.

See AUDITA QUERELA.

